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82-1655

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURDOCK HEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the standards articulated by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), for the application of the collateral estoppel component of the Double Jeopardy Clause have proved excessively confusing in the context of criminal cases in which more than one rational basis, but only one plausible basis, exists for a general verdict, thereby resulting in:

a. the application by lower courts of mechanical approaches to the application of collateral estoppel at the expense of this Court's stress on realism, rationality, and practicality;

b. the failure by the court below to evaluate what factual determinations were previously made in petitioner's favor; and

c. the adoption by the court below of a hypertechnical and irrational theory, premised upon an error of law, for prior jury acquittals.

2. Whether the court below erred in holding, unlike numerous other circuits, that interlocutory appeals of collateral estoppel claims that would absolutely bar one basis of conviction, but not necessarily all bases of conviction, are frivolous *per se* under *Abney v. United States*, 431 U.S. 651 (1977), and that the district court had jurisdiction to proceed to trial despite the pendency of an *Abney* appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Dr. Murdock Head petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals sought to be reviewed is reported in *United States v. Head*, 697 F.2d 1200 (4th Cir. 1982) (App. A, *infra*, 1a-22a) [hereinafter cited as *Head II*]. An earlier opinion in this case is reported in *United States v. Head*, 641 F.2d 174 (4th Cir. 1981) (App. B, *infra*, 1b-12b) [hereinafter cited as *Head I*]. The rulings of the United States District Court for the Eastern District of Virginia were made from the bench and the transcript is contained in the certified record before the Fourth Circuit.[1]

[1] References to the joint appendix certified before the Fourth Circuit will be indicated by "A.," followed by a roman numeral which refers to the particular volume of the joint appendix, followed by a number which refers to the page or pages of the particular volume—*e.g.*, (A.V. 10) would be joint appendix volume V, page 10. Similarly, references to the Special Appendix will be indicated as "S.A.," followed by a page number or numbers.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1982. On February 10, 1983, the court of appeals denied a timely petition for rehearing. (App. C, *infra*, 1c.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are based upon the Fifth Amendment. The statutory provisions relevant to this petition are 18 U.S.C. § 371, 26 U.S.C. §§ 7201 and 7206(2), and 28 U.S.C. § 1291. The texts of these constitutional and statutory provisions are reprinted in Appendix D, *infra*, 1d-2d.

STATEMENT OF THE CASE

Petitioner, Dr. Murdock Head, a Professor of Surgery at The George Washington University (the "University") for twenty-seven years and a holder of degrees and licenses in dentistry and law, created the Airlie Foundation (the "Foundation") in the late 1950s. This case grows out of Dr. Head's involvement in the Foundation and various entities that provide services to the Foundation.

The Foundation is a non-profit, tax-exempt educational center near Warrenton, Virginia that sponsors conferences, publishes written materials, and produces award-winning documentary films for television on social and medical topics such as birth control, cancer, drug abuse, alcoholism and heart disease. Many of the Foundation's projects are undertaken in association with the University. Dr. Head had served as the Foundation's Executive Director from the beginning without compensation until his resignation in 1979 after his indictment.

In addition, Dr. Head personally donated $2 million to the Foundation and established a trust fund to enable the Foundation to carry on its work after his death. The ultimate beneficiary of the trust fund is the University.

This petition focuses primarily upon alleged tax crimes by Dr. Head in connection with the film-making activities of the Foundation. The Foundation's film-producing arm is Airlie Productions, which subcontracts its work to Raven's Hollow Limited, a federally taxable entity also created by petitioner. The daily business of Raven's Hollow is and always has been conducted by paid administrators, managers, and bookkeepers, and legal control is vested in its Board of Directors. Dr. Head was neither a member of the Board nor an officer or stockholder of Raven's Hollow.

The Indictment and the First Trial

Petitioner was indicted in 1979 by a grand jury on thirteen criminal charges. Count One of the indictment, which alleged a multiple-object conspiracy between petitioner and other unindicted individuals, basically charged that petitioner had conspired with others to defraud the United States, in violation of 18 U.S.C. § 371. Essentially, the alleged conspiracy had three objects: (1) the bribery of former Congressman Daniel Flood and his aide, Stephen B. Elko, in violation of 18 U.S.C. § 201(b) and (f); (2) the giving of a thing of value, (*i.e.*, a loan of $11,000 at advantageous interest rates) to an Internal Revenue Service agent in violation of 18 U.S.C. § 201(f); and (3) the evasion of Raven's Hollow's federal income taxes in violation of 26 U.S.C. §§ 7201 and 7206(2).

The remaining twelve counts charged the actual substantive violations alleged as objects of the conspiracy. In particular, Counts Eight through Thirteen alleged violations of the Internal Revenue Code with respect to three income tax returns of Raven's Hollow for tax years 1973 through 1975. (App. E, *infra*, 1e-5e.)

The first trial on this indictment commenced before Judge Oren R. Lewis on October 2, 1979. Petitioner's defense to the tax offenses was basically that he had no willful involvement with any attempt to defraud the United States of revenue.

Petitioner was convicted by general verdict of the jury only on Count One, the conspiracy charge. Also by general verdict of the jury, petitioner was acquitted of aiding and abetting the evasion of approximately $15,000 of taxes due from Raven's Hollow for tax years 1974 and 1975. The jury was unable to reach a verdict for the remaining evasion count for tax year 1973.[2] The government argued against petitioner's post-trial motion for acquittal on the hung count by postulating that the jury's acquittals on the 1974 and 1975 evasion counts might have been based upon its belief that the amount of taxes due and owing was not substantial for those two years. (A.I. 236-40.) The court rejected this interpretation of the verdict, concluding that "[t]he jury said it was not done with willfulness," (A.I. 241), and that it was not satisfied that petitioner "had anything more to do with '73 than [with] '74 and '75." (A.I. 251.) The court then entered a judgment of acquittal on the remaining evasion count based upon insufficient evidence. (App. F, *infra*, 1f.)

The three remaining substantive tax counts, alleging petitioner's involvement in false filings for tax years 1973 through 1975, were dismissed by the trial court at the close of the evidence on the ground of insufficient evidence to support a verdict. (A.I. 130.) *See also Head I*, 641 F.2d at 177, App. B, *infra*, 3b. Before dismissing those counts, the trial judge stated that the government had failed to "produce any evidence that [petitioner] had knowledge [of] what was in [the returns]," (A.I. 204), and that there was insufficient evidence that petitioner "had any direct contact of any kind . . . [with] the preparation of the tax return; no evidence he saw it; no evidence he was asked to approve it or had anything to do with it." (A.I. 203.)[3]

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[2] It is important to note that the evidence of alleged tax offenses in 1973 was slightly different than that for 1974 and 1975. A government witness testified that during 1973, petitioner had back-dated certain leases. Petitioner simply denied that such back-dating had occurred. In any event, there has never been any allegation by the government that the alleged back-dating had any tax consequences in 1974 and 1975.

[3] Count Two, the substantive count alleging bribery of Congressman Flood, was severed prior to trial and later dismissed by the government. Of the remaining substantive counts, insufficient evidence was produced by the government either to satisfy the court that they should be submitted to the jury or to convince the jury of petitioner's guilt beyond a reasonable doubt.

The 1981 Decision of the Court of Appeals

Petitioner's conspiracy conviction at the 1979 trial was reversed and remanded by the court of appeals, *Head I*, 641 F.2d 174, App. B, *infra*, 1b, on the ground that the trial judge had erred in refusing to instruct the jury that, in order to convict petitioner of conspiracy, it had to find an overt act in furtherance of the conspiracy within the period not barred by the statute of limitations.

In addition, in remanding the conspiracy count to the district court, the court of appeals stated: "The jury acquitted [petitioner] on the only substantive tax counts submitted to it. The likelihood that the jury found a tax object of the conspiracy, therefore, seems somewhat remote." *Id.* at 178 n.6, App. B, *infra*, 5b.

Pre-Trial Motions Based on the Double Jeopardy Clause

Upon remand to the district court, petitioner filed motions contending that the collateral estoppel component of the Double Jeopardy Clause precluded retrial of that portion of the conspiracy charge relating to tax offenses. The tax object of the conspiracy alleged in the second trial focused upon the same Raven's Hollow tax returns that were at issue in the substantive tax counts litigated at the first trial, of which petitioner was acquitted or which were dismissed based upon insufficient evidence. The district court orally denied petitioner's motions on May 15, 1981.

The Interlocutory Appeal

Five days after the district court denied his double jeopardy claims, petitioner noticed an interlocutory appeal of that denial pursuant to *Abney v. United States*, 431 U.S. 651 (1977). Stays of the trial pending the appeal were denied orally by the district court and by written order of the court of appeals, (App. G, *infra*, 1g). The interlocutory appeal was still pending before the court of appeals at the time retrial on the conspiracy count began and throughout the course of that trial.

The Second Trial

The trial on remand began before Judge Lewis on June 17, 1981. During the trial the government once again attempted to prove a conspiracy, but with only two basic objects. (App. H, *infra*, 1h-2h.) It contended that during 1974 and 1975 petitioner had conspired to evade federal income taxes by manipulating the books of Raven's Hollow, the so-called "tax object." It also contended that petitioner had conspired to bribe powerful members of Congress to wield influence over legislative decisions for the benefit of the Foundation and the University, the so-called "bribery object."[4] The jury returned a general verdict of guilty on the conspiracy charge. In addition, petitioner was convicted of a newly-charged substantive gratuity count under 18 U.S.C. § 201(f).

The 1982 Decision of the Court Below

Petitioner appealed both convictions resulting from the 1981 trial. Petitioner argued, *inter alia*, that the Double Jeopardy Clause required reversal of both convictions. He contended that the district court lacked jurisdiction to try him while the interlocutory appeal on double jeopardy grounds was pending. He further argued that the district judge permitted a second jury to receive evidence on numerous issues that had previously been determined in his favor as a result of the acquittals and dismissals of the substantive tax counts at the first trial. Petitioner asserted that this infringement of his constitutional rights under the Double Jeopardy Clause had prejudiced his ability to defend against both the new substantive gratuity charge and the bribery object of the conspiracy.

After the second trial was over, the court of appeals addressed in a single opinion the interlocutory appeal and the appeal of the 1981 trial itself. The court belatedly revealed that its earlier denial of petitioner's motion for a stay of the trial

[4] The remaining object of the conspiracy count litigated at the first trial, the giving of a thing of value to an Internal Revenue Service agent, was not included in the conspiracy count at retrial. In addition, tax offenses alleged to have taken place in 1973 were not included as overt acts in the second trial, because they fell outside of the statute of limitations.

pending the interlocutory appeal was intended to be a summary disposition of petitioner's double jeopardy claims as "frivolous." *Head II*, 697 F.2d at 1204, App. A, *infra*, 4a-5a. The court held that a collateral estoppel claim such as petitioner's, which seeks to estop relitigation of only one object of a dual-object conspiracy charge is, on its face, "frivolous" as a double jeopardy claim and thus does not give rise to an interlocutory appeal under *Abney*. The court also rejected petitioner's claim on its merits, holding that petitioner's acquittals on tax evasion charges did not preclude a second trial on the charge of a conspiracy to defraud the United States of taxes with respect to the same tax years, since those acquittals could have been predicated on the determination that the amounts of taxes due and owing were insubstantial. *Id.* at 1208-09, App. A, *infra*, 12a-13a.

Petitions to stay the execution of the Fourth Circuit's mandate pending the review of this petition were denied by the court below, (App. I, *infra*, 1i), and by this Court, (App. J, *infra*, 1j). Petitioner commenced service of the four and one-half year sentence imposed by the district court on March 4, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

This case is the latest in a series of cases pointing to the need for clear guidance by this Court as to the manner in which lower courts should apply collateral estoppel in the context of ambiguous general jury verdicts. Lower court decisions, such as that of the court below, demonstrate that rather than applying collateral estoppel with realism, rationality, and practicality, as required by *Ashe v. Swenson*, 397 U.S. 436 (1970), a majority of courts has effectively adopted mechanistic approaches so "technically restrictive" as to bring about the very result that *Ashe* was designed to avoid, namely the evisceration of the constitutional guarantee against double jeopardy. In so doing in the instant case, the court below permitted the relitigation of issues barred by the Double Jeopardy Clause and, consequently, tainted the entire second trial.

Moreover, the refusal by the court below to entertain an immediate interlocutory appeal regarding petitioner's double jeopardy-collateral estoppel claims stemmed from a fundamental misunderstanding, manifested in a conflict among the circuits, as to the kinds of factual issues to which *Abney* applies. This case demonstrates the need for clarification of the standards to be employed under *Abney* in determining whether immediate interlocutory review is mandated for collateral estoppel claims, particularly those that would preclude one potential basis of conviction under a single criminal count containing numerous bases upon which a conviction could be founded.

I. The Vague Standards for Examining Ambiguous Verdicts Under *Ashe v. Swenson* Have Led to Widespread Confusion Among the Lower Courts and Thereby Deprived Petitioner of the Protection of the Collateral Estoppel Component of the Double Jeopardy Clause.

In *Ashe*, this Court held that the doctrine of collateral estoppel was subsumed within the constitutional guarantee against double jeopardy. The Court declared that the doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443.

This Court emphasized that collateral estoppel must be applied with "realism and rationality," rather than with "the hypertechnical and archaic approach of a 19th century pleading book." *Id.* at 444. When a previous judgment of acquittal is based upon a general verdict, the reviewing court is directed to " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* (quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)). *Ashe* further requires that such inquiries must " 'be set in a practical frame

. . . with an eye to all the circumstances of the proceedings.' " *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)).

In *Ashe*, the single realistic issue decided by the jury in the first trial was relatively obvious. In situations of greater complexity and ambiguity, however, *Ashe* has had little effect and provides inadequate guidance. As a result, the concern addressed by *Ashe*—prevention of "the proliferation of federal criminal statutes with numerous and overlapping offense categories [that] would invite abusive reprosecutions under the traditional double jeopardy protection" (Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 Am. Crim. L. Rev. 259, 279 (1978))—has not been sufficiently heeded.

A. The Lack of Clear Standards in *Ashe* Has Given Rise to Mechanistic Approaches in the Application of Collateral Estoppel, Thereby Effectively Vitiating that Constitutional Doctrine.

Ashe was intended to instill new life into the Double Jeopardy Clause. Unfortunately, the standards laid down in *Ashe* for applying collateral estoppel in criminal cases have proved confusing. The critical issue left unaddressed by *Ashe* is how to reconcile this Court's mandate that collateral estoppel be applied with realism, rationality, and practicality with its statement that a court may deny a collateral estoppel claim simply by concluding that a rational jury *could* have founded its verdict upon an issue other than that which the defendant seeks to foreclose. In other words, the question is what course courts should follow when a theory proffered in support of a jury's actions is arguably rational but clearly less realistic and practical than that postulated by the defendant. Experience under *Ashe* has shown that a theory that is wholly implausible under the circumstances may not be entirely irrational. In this regard, *Ashe* has turned out to be confusing, and a lack of clarity in its standards has caused inconsistencies in the actions of the lower courts.

The lack of clarity in *Ashe* and the difficulty of demonstrating that a particular issue was actually decided in a defendant's

favor at a prior trial has paved the way for two dangerously abbreviated and mechanistic approaches to the application of collateral estoppel by lower courts in criminal cases: (1) the use of the "same evidence" test to decide narrowly those elements of a criminal offense that were necessarily determined in the defendant's favor by a prior general acquittal, and (2) the placement of an all-too-often impossible burden on the defendant to prove that a prior jury *necessarily* decided a particular issue in his favor to the exclusion of every other theoretically possible basis for the jury's action.

These two restrictive approaches suffer from the same infirmity. Each allows the second court to subdivide an issue or defense into hypertechnical fragments so as to preclude the precise identification of any issues necessarily decided in a defendant's favor in a prior trial. Courts utilizing these fragmenting approaches inevitably conclude that a jury could have rested its verdict upon an element or issue other than that which the defendant seeks to foreclose. Such approaches clearly controvert this Court's intentions in *Ashe*.

The use of the "same evidence" or "same elements" approach can best be described as follows:

> Because of the difficulty in determining with any precision the basis on which a jury reached its verdict, courts often resort to comparing the elements of the first offense with those of the second offense. If there is a difference in any of the required elements the court will conclude that a rational jury *could* have grounded its verdict on another issue, and collateral estoppel will not bar a second trial. In effect, the courts are using the "same evidence" test to decide on what issues a rational jury might have based its verdict, despite a warning by the Supreme Court in *Ashe* that such a mechanical approach would amount to a rejection of the rule of collateral estoppel.

Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 Am. Crim. L. Rev. at 283. This

approach has manifested itself in a significant number of cases.[5] Yet the "same evidence" method of analysis too easily excuses a court from undertaking the thorough analysis of the prior proceedings mandated by *Ashe* and, consequently, infringes upon the constitutional protections afforded criminal defendants. As one commentator has stated, "in cases involving multiple prosecutions for two conspiracies or for a conspiracy and its completed offense, collateral estoppel seldom applies [because] . . . [c]onspiracy and the completed offense involve different essential elements." *Id.* at 283.

The second and more common approach of the lower courts demonstrates the impotence of *Ashe* in cases involving multiple defenses. *See* Note, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 147 (1970). In dicta, the Fifth Circuit aptly summarized the ambiguity in *Ashe* leading to the imposition of impossible burdens on criminal defendants:

> In their briefs and at oral argument, the Government and the attorneys for Leach did not completely agree on the legal standard required by *Ashe* and its progeny. The Government contends that "this Court . . . must determine what issues the jury necessarily must have resolved in the Appellant's favor . . . ." Leach contends that this court should look to "what a rational jury might have done." We are not sure that there is more than a semantic difference between these standards.

United States v. Leach, 632 F.2d 1337, 1340 n.7 (5th Cir. 1980) (citations omitted).

In fact, this difference is far from merely semantic. Some courts, like the court below, have narrowly interpreted their obligation to review trial court proceedings, collaterally estopping relitigation only of facts "necessarily" determined in the

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[5] *See, e.g., Bell v. Kansas*, 452 F.2d 783, 792-93 (10th Cir. 1971), *cert. denied*, 406 U.S. 974 (1972); *Percy v. South Dakota*, 443 F.2d 1232, 1234-35 (8th Cir.), *cert. denied*, 404 U.S. 886 (1971). *See also White v. State*, No. 2 Div. 236 (Ala. Crim. App. Jan. 30, 1979, on LEXIS, State Library, Alabama file); *State ex rel. Russell v. Perkins*, 34 Ohio St. 2d 48, 295 N.E.2d 661, 664-65 (1973); *Sutton v. State*, 495 S.W.2d 912, 914-15 (Tex. Crim. App. 1972).

defendant's favor in the former trial, and strictly defining "necessarily" so that "[t]he defense of collateral estoppel will not often be available to a criminal defendant." Schaefer, *Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe*, 58 Calif. L. Rev. 391, 394 (1970); *see also Martin v. Estelle*, 691 F.2d 202, 205 (5th Cir.), *reh'g denied*, 693 F.2d 133 (5th Cir. 1982). The courts that narrowly apply *Ashe* concede that when several defenses were raised at a prior trial, it will be virtually impossible to satisfy the second court that any one of those defenses or issues was necessarily decided in the defendant's favor.[6]

The intolerable effect of this second categorical approach is that a defendant who presents all of his defenses at his first trial necessarily increases the risk of losing the collateral estoppel defense in any subsequent proceeding, since his very diligence makes the basis of any resulting acquittal ambiguous. "The net result . . . is that a defendant can often fare better if his counsel at a first trial is incompetent and does not raise all of the available defenses." *Martin v. Estelle*, 691 F.2d at 204. More

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[6] *See, e.g., United States v. Clark*, 613 F.2d 391, 402 (2d Cir. 1979) ("we are mindful of the reality that the basis upon which [a] general verdict was reached usually cannot be demonstrated with certainty"), *cert. denied*, 449 U.S. 820 (1980); *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir.) ("[s]ince it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case, it is a rare situation in which the collateral estoppel defense will be available to a defendant"), *cert. denied*, 419 U.S. 1079 (1974). *See also State v. Shotwell*, 4 Kan. App. 2d 382, 607 P.2d 83, 87 (1980) ("Who can successfully unravel the thought processes and state of mind of the jurors to interpret the meaning of their general verdicts?"); *State v. Juelfs*, 281 N.W.2d 148, 150 (Minn. 1979) (collateral estoppel held inapplicable because "the acquittal of the one charge and the conviction of the other may simply mean that the jury was exercising its power of lenity in an attempt to limit the punishment of defendant"). In particular, the restrictive interpretations of *Ashe* adopted by the Second Circuit have led the Ninth Circuit to comment that the Second Circuit's rationale "cannot be squared with the teachings of the United States Supreme Court in *Ashe v. Swenson* . . . ." *United States v. Hernandez*, 572 F.2d 218, 222 n.5 (9th Cir. 1978) (citing *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976); *United States v. Cala*, 521 F.2d 605 (2d Cir. 1975); *United States v. Cioffi*, 487 F.2d 492 (2d Cir. 1973)).

important, this restrictive approach allows the prosecution to retry the issue or issues most reasonably decided in a defendant's favor at a prior trial.

Other courts, however, have taken to heart *Ashe's* references to realism, rationality, and practicality in the application of collateral estoppel.[7] In general, those courts have applied collateral estoppel when the first acquittal appeared reasonably likely to have been grounded on an issue in the second trial.

Petitioner submits that this latter line of cases is far more consistent with *Ashe's* emphasis on taking a realistic and rational approach to claims of double jeopardy and collateral estoppel. Unfortunately, this view, although more faithful to the spirit of *Ashe*, has been adopted by only a minority of courts. The two common but, petitioner submits, erroneously restrictive interpretations of *Ashe* amount to the adoption by many federal and state courts of approaches so "technically restrictive" as to "simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case

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[7] *See, e.g., Johnson v. Estelle*, 506 F.2d 347, 350 (5th Cir.) (court rejects government argument that *Ashe* applies only when a single issue is in question in both trials—notes that state's theories underlying prior acquittal are "nothing more than the sheerest speculation"), *cert. denied*, 422 U.S. 1024 (1975); *United States v. Phillips*, 502 F.2d 227, 232 (4th Cir. 1974) ("once a criminal defendant has undergone a trial and a favorable verdict, considerations of fairness . . . seem to dictate resolving doubts . . . in favor of the defendant"), *vacated and remanded on other grounds*, 424 U.S. 961, *cert. denied*, 429 U.S. 1024 (1976); *United States v. Hans*, 548 F. Supp. 1119, 1125-26 (S.D. Ohio 1982) (collateral estoppel applied on the basis of the court's "most reasonable" inference—defendant should not be required "twice to defend against two factual allegations, one or both of which have previously been decided in his favor, merely because it is impossible to determine with certainty which one, or whether both, were so decided." *See also State v. Knowles*, 392 So. 2d 651, 657 (La. 1980) (collateral estoppel applied after concluding that "the [government's] theory [for the prior acquittal] may not be irrational in the abstract, but when it is matched against the facts addressed at the [first] trial, it becomes apparent that the [subsequent] prosecution is an attempt to relitigate the broad scope of facts found adversely to the government"); *State v. Lewis*, 599 S.W.2d 94, 98 (Mo. Ct. App., W.D. 1980) (in applying collateral estoppel, "a court is exhorted to practicality and to avoid rigid doctrine to assess from the entire proceeding the facts actually adjudicated by the general verdict of acquittal").

where the first judgment was based upon a general verdict of acquittal." *Ashe v. Swenson*, 397 U.S. at 444. Since the language of *Ashe* has not foreclosed such restrictive applications of collateral estoppel, the need for this Court's clarification of *Ashe* is imperative.

B. The Mechanistic Approach of the Court Below Caused its Failure to Consider Factual Determinations Previously Made in Petitioner's Favor.

The confusion among the lower courts as to the appropriate standard of review under *Ashe* is exemplified by the opinion of the court below. The mechanistic approach taken by the court of appeals avoided any mention of factual issues that had necessarily been determined in petitioner's favor at the first trial. Because of this failure, the government was erroneously permitted to relitigate petitioner's involvement in various tax offenses in direct violation of his Fifth Amendment rights.

The only semblance of analysis undertaken by the Fourth Circuit pursuant to *Ashe* starts and ends with the assertion that petitioner's acquittal "obviously could have been predicated solely on the amount of tax evaded." *Head II*, 697 F.2d at 1208-09, App. A, *infra*, 13a. On the basis of this mere assertion, the court concludes that the government was not collaterally estopped, for purposes of demonstrating the tax object of the conspiracy, from relitigating the very same tax-related issues as to which petitioner had been acquitted at his first trial. *Id.*

The theory for the jury's actions postulated by the court below is a manifestation of an egregious failure on the court's part—the failure to review petitioner's collateral estoppel claims " 'in a practical frame . . . with an eye to all the circumstances of the proceedings.' " *Ashe v. Swenson*, 397 U.S. at 444. The estoppel that petitioner asserts is based upon the significance of his acquittals on three substantive counts of tax evasion and the trial judge's dismissal of three false filing counts for lack of sufficient evidence. Statements by the trial judge and by the court of appeals itself in reviewing the first trial, *see supra* p. 5, make it apparent that the substantive tax

issues necessarily decided in petitioner's favor should have precluded the relitigation of the tax object of the conspiracy in the second trial.

Petitioner's sole defense to the substantive tax offenses at the first trial was the absence of willfulness. The essence of this defense was pithily summarized by Judge Lewis in his charge to the first jury: "By reducing it to simplicity, he just doesn't know anything about it. He didn't sign it. He didn't see it. Had nothing to do with it, in substance." (A.I. 41); *see also* (A.I. 30-33). In other words, petitioner's connection with any evasion of taxes by Raven's Hollow was not willful. The collective effect of the actions by the fact finders—judge and jury alike— was to endorse petitioner's defense. At the second trial the issues, the evidence, and petitioner's defense were identical.

The examination of the record required by *Ashe* clearly demonstrates that a rational jury must necessarily have been no less convinced than the trial judge of the truth of petitioner's basic defense. The hypertechnical theory postulated by the court below for these acquittals seems impossibly far-fetched when viewed in the context of the first trial.

The jury at the first trial was instructed by the judge that in order to convict petitioner of substantive tax evasion, it had to find that a fraudulent tax return was filed on behalf of Raven's Hollow with the specific intent on petitioner's part to willfully and knowingly evade a substantial tax. (A.I. 35, 38.) The jury's acquittals for the two counts relating to 1974 and 1975 can only be interpreted in one of two ways—either (1) petitioner lacked involvement in and, therefore, the intent to evade the payment of taxes for Raven's Hollow (the defense asserted by petitioner throughout the trial), or (2) the Raven's Hollow tax returns were not fraudulent (*i.e.*, the corporation did not owe substantial taxes). Either of these interpretations would negate the existence of the requisite intent on the part of petitioner willfully to evade a substantial tax. This absence of willfulness alone should have precluded a retrial on the tax object of the conspiracy, since such a finding would negate the

existence of the specific intent necessary for a conspiracy conviction under the tax object. *See Ingram v. United States*, 360 U.S. 672, 678 (1959), *reh'g denied*, 361 U.S. 856 (1959).

Indeed, despite the government's argument that the acquittals of tax evasion charges for 1974 and 1975 could have been based upon the insubstantiality of the taxes involved, the trial court nonetheless endorsed petitioner's defense and entered a judgment of acquittal on the 1973 count involving a greater amount of taxes allegedly evaded on which the jury had hung, (A.I. 236-40), noting that the jury stated that the failure to pay the taxes in 1974 and 1975 was not "willful," (A.I. 241). The trial judge concluded that petitioner had nothing more to do with the alleged offense for 1973 than with the two tax years for which jury acquittals were entered. (A.I. 251.)

Moreover, the dismissals by the trial judge of the false filing counts on the ground of insufficient evidence[8] were premised on crucial findings of ultimate fact that once again reflect an endorsement of petitioner's defense to the tax charges. Prior to dismissing those counts, the trial judge expressly stated that the government had failed to "produce any evidence that [petitioner] had knowledge [of] what was in [the returns]," (A.I. 204), or that petitioner "had any direct contact of any kind . . . [with] the preparation of the tax return; no evidence he saw it; no evidence he was asked to approve it or had anything to do with it," (A.I. 203).

The court below, however, erroneously refused to recognize the collateral estoppel effect of these factual resolutions by simply stating that the trial court had erred in believing that such participation and knowledge was required by the statute, citing contrary decisions of other judicial circuits. *Head II*, 697

[8] The court of appeals itself described the three false filing counts as having been "dismissed by the district court for insufficient evidence." *Head I*, 641 F.2d at 177, App. B, *infra*, 3b; *see also* (A.I. 130) (judge's charge to the jury demonstrates that dismissals were based upon insufficient evidence to support a verdict).

F.2d at 1208 n.13, App. A, *infra*, 12a.[9] Had the Fourth Circuit conducted a thorough review of the record as required by *Ashe* and viewed the proceedings as a whole, it would have discovered that, before entering the dismissals, the trial judge was made aware of the broad view of the law of false filing urged by the government.[10] Nothing in the record indicates that the Fourth Circuit rejected that view. To the contrary, in dismissing those counts based upon insufficient evidence, the trial court made clear that it was acting on the basis of a finding of fact rather than a conclusion of law. The trial court expressly concluded that petitioner neither had knowledge of what was in the returns nor had anything to do with them. (A.I. 203-04.)

The cumulative effect of the three acquittals, three dismissals and the relevant statements made by the judge at the first trial is to demonstrate that the following factual determina-

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[9] In rejecting the collateral estoppel effect of these dismissals, the court below failed to heed the relevant rulings of this Court. In *United States v. Scott*, this Court acknowledged that, for purposes of the double jeopardy clause, "a defendant is acquitted when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], *correct or not*, of some or all of the factual elements of the offense charged.' " 437 U.S. 82, 97, *reh'g denied*, 439 U.S. 883 (1978) (emphasis added) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), *reh'g denied*, 439 U.S. 883 (1978)). The Fourth Circuit failed to distinguish the instant case from *Scott* and apparently concluded that the trial court's dismissals were simply erroneous legal rulings rather than findings of ultimate fact in petitioner's favor. In *United States v. Scott*, this Court was confronted with the question of what protections arise from the dismissal of two counts of a three-count indictment because of prejudice from pre-indictment delay. Unlike the instant case, however, it was apparent that the trial court dismissed those counts "on a basis unrelated to factual guilt or innocence." 437 U.S. at 99. Furthermore, *Scott* did not involve any determination of the sufficiency of the evidence involved. In any event, regardless of whether these rulings were based upon an erroneous legal theory, they have full double jeopardy-collateral estoppel effect. Even assuming *arguendo* that the trial court did base its factual resolutions upon an erroneous interpretation of the law, petitioner is nevertheless entitled to the benefit of those resolutions previously made in his favor by the court. *See Sanabria v. United States*, 437 U.S. 54, 64 (1978).

[10] The government presented the trial judge a copy of this broad view adopted in *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976), prior to his dismissal of the false filing offenses.

tions were made in petitioner's favor: (1) he did not know what was in the Raven's Hollow tax returns; (2) he had no direct contact of any kind with the preparation of the returns; (3) he did not see the returns; (4) he did not approve the returns; (5) he did not have anything to do with the returns; and (6) any failure to pay taxes due and owing to the United States by Raven's Hollow caused by petitioner was not willful. In light of these determinations, no rational jury could have concluded realistically, reasonably, or practically at the same time that petitioner had the requisite intent to defraud the United States through tax evasion or false filing at a time within the period not barred by the statute of limitations. Moreover, the fact finders must also have determined that petitioner did not conspire with anyone else to evade taxes or make false filings for the years involved, because the acquittals and dismissals were entered in view of petitioner's exposure to vicarious liability for the acts of co-conspirators.[11]

Despite the court of appeals' apparent neglect to consider their significance, the oral findings of a trial judge must constitute an important element in the application of collateral estoppel.[12] *See United States v. Sarno*, 596 F.2d 404, 408 (9th Cir. 1979); *but cf. United States v. Barket*, 530 F.2d 181, 187 & n.10 (8th Cir. 1975) (unclear whether statements from the bench can "bring the *Ashe v. Swenson* rule into play"), *cert. denied*, 429 U.S. 917 (1976). There is no indication in the

[11] In accordance with this Court's holding in *Pinkerton v. United States*, 328 U.S. 640, 646-47, *reh'g denied*, 328 U.S. 818 (1946), the trial court rendered the following instruction to the jury:

> If you find that [petitioner] is guilty of conspiracy as charged in . . . this indictment, . . . [petitioner] may be found guilty of this substantive count, even though he did not participate in the acts constituting the offense. . . . The reason for this is that a conspirator committing a substantive offense pursuant to a conspiracy is held to be the agent of all other conspirators.

(A.I. 43-44.)

[12] During oral argument on petitioner's motions prior to the second trial, the trial court made certain comments tending to denigrate its statements cited here. (S.A. 78, 91.) Needless to say, if a trial judge is permitted to erase prior factual determinations in a criminal defendant's favor with a *post hoc* wave of

(footnote continues)

Fourth Circuit's opinion that the statements of the trial judge were even considered in evaluating petitioner's collateral estoppel claims. This Court's guidance is needed to assure that the lower courts, will consider such statements and give them due weight.

The effect of failing to conduct a thorough analysis of the prior proceedings as required by *Ashe* was to permit the government not only to relitigate issues previously decided in petitioner's favor, but also to reintroduce the same tax evidence in the retrial of the conspiracy count that it had unsuccessfully presented in support of the substantive tax counts involving the same transactions at the first trial.[13] Specifically, the government was permitted to incorporate two overt acts in furtherance of the tax conspiracy that alleged petitioner's involvement in the preparation and causation of false and evasive income tax returns—the same returns that formed the bases for substantive tax counts that were either dismissed for insufficient evidence or of which petitioner was acquitted at the first trial. Such second opportunities are exactly what *Ashe* and the Double Jeopardy Clause were designed to prevent. *Ashe v. Swenson*, 397 U.S. at 447.

(footnote continued)
his hand, the Double Jeopardy Clause becomes captive to caprice and the potential is created for vindictiveness against those who successfully appeal their convictions.

It should be noted that the trial judge in this case was less than amiable during pre-trial motions and during the course of the second trial. Denying that he had made reversible error, Judge Lewis repeatedly expressed concern over the Fourth Circuit's reversal of petitioner's conviction in the first trial. (S.A. 115.) Stating that "I am not going to read the evidence over again," (S.A. 78), and "[a] lot of times the things I say are not conclusive when I speak extemporaneously," (S.A. 106), the trial judge simply refused to examine the evidence and his own stated reasons for entering orders at the first trial to determine what issues, if any, were resolved in petitioner's favor at that time.

[13] The "commonality" of the proof of the substantive tax violations alleged for tax years 1973-75 and the conspiracy charge was emphasized by the government in its opposition to petitioner's motion for a severance prior to the first trial:

> Upon review of the Indictment, it is clear that without exception the objects and/or overt acts which fall within the timespan and the four corners of the conspiracy count form the

(footnote continues)

C. The Hypertechnical Theory Postulated by the Court Below for the Acquittals at the First Trial Was Not Only Implausible, but also Irrational Because Premised on an Error of Law.

By prematurely terminating its *Ashe* inquiry after resting the jury's acquittals of the evasion counts on the insubstantiality of the taxes involved, the court below failed to recognize that, even under its own theory, an essential issue—intent—had necessarily been decided in petitioner's favor by the jury in the first trial, thereby precluding relitigation of the tax object of the alleged conspiracy. Thus, even if the hypertechnical theory postulated by the court below is indulged, the conclusion that petitioner was deprived of his double jeopardy protections nonetheless results.

The trial court's charge to the jury defined the substantive offense as follows: (1) a *substantial* tax must have been due, (2) the accused must have had *knowledge* that a *substantial* tax was due and (3) the accused must have *willfully* attempted to evade the tax due. (A.I. 33-38.) *See also* 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* ¶ 35.07 (3d ed. 1977); *accord United States v. Pomponio*, 429 U.S. 10, 12 (1976), *reh'g denied*, 429 U.S. 987 (1976); *Ingram v. United States*, 360 U.S. at 678-79; *id.* at 681-82 (Harlan, J., concurring in part and dissenting in part).

The court below focused solely on the element of substantiality. As a review of the proceedings of the first trial demonstrates, however, it was unrealistic, irrational, and

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(footnote continued)

> [substantive] offenses charged . . . or are evidence thereof. This commonality of proof, we submit, commands not only joinder of these interrelated offenses in one indictment, but disposition in one trial.
>
> . . .
>
> We note that if the conspiracy count were to be tried alone, without any of the other counts, all of the Government's evidence necessary to prove the Indictment unsevered, would have to be introduced in the conspiracy trial in order to support that charge. The remaining three trials would be fractionalized duplicates of the first conspiracy trial.

(A.IV. 175.)

impractical for the reviewing court to separate the elements of substantive tax evasion into discrete fragments, because those elements were presented to the jury as a unified whole, integrally related to intent. In the instruction to the jury on the issue of substantiality, the trial judge stated: "A substantial amount is a whole lot more than two dollars, but it doesn't have to be ten million. You know what the word substantial means. It has to be an appreciable amount, something that is *deliberate, willful* as distinguished from accidentally adding something up wrong." (A.I. 35) (emphasis added). The absence of any substantiality would therefore negate the existence of the intent necessary to commit the substantive tax offense.

Yet in a restrictive approach akin to that of the "same evidence" test, the court below broke off its analysis with barely a mention of the record of the earlier proceedings in this case. In its haste, the court failed to recognize that if the jury had decided that no *substantial* tax was due and owing for the tax years alleged during the conspiracy, it must necessarily also have decided that petitioner lacked the intent to *conspire* to evade a *substantial* amount of tax — the basic defense asserted throughout the first trial.

This Court has held that a conviction for conspiracy to commit a substantive tax offense must be supported by proof of "'*at least* the degree of criminal intent necessary for the substantive offense itself.'" *Ingram v. United States*, 360 U.S. at 678 (citation omitted). Furthermore, in order to prove a substantive tax offense, it must be demonstrated that the taxpayer voluntarily and intentionally acted or attempted to act in violation of a known legal duty. *United States v. Pomponio*, 429 U.S. at 12. Thus, it is impossible to conceive how petitioner could possess the intent to conspire to defraud the United States through tax evasion and false filings without knowing that he would, if successful, be violating a known legal duty — the payment of substantial taxes due and owing to the United States. One simply cannot *know* that a substantial tax is due if no subtantial tax in fact is due. Indeed, it is well established that "when defendants are charged with a willful attempt to evade their taxes under Section 7201 and with a conspiracy to

commit that violation in one indictment, if the prosecution failed to prove that a tax was due and owing, both the substantive violation and the conspiracy would fall." B. Kostelanetz & L. Bender, *Criminal Aspects of Tax Fraud Cases* 39 (3d ed. 1980) (citing *United States v. Klein*, 139 F. Supp. 135, 137 (S.D.N.Y. 1955), *aff'd*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 24 (1959)).

Petitioner respectfully submits that the legal contradictions in the Fourth Circuit's own theory warrant summary reversal by this Court.

II. The Lack of Appropriate Standards for Interlocutory Review of Collateral Estoppel Claims Allowed Petitioner to be Subjected to Double Jeopardy by a District Court Sitting Without Jurisdiction.

In *Abney v. United States*, this Court held that a pretrial order denying a motion to dismiss on double jeopardy grounds is subject to an interlocutory appeal under 28 U.S.C. § 1291. 431 U.S. at 662. *Accord United States v. Hollywood Motor Car*, 458 U.S. ____, 102 S. Ct. 3081, 3083 (1982). The rationale for this important exception is that "the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice *put to trial* for the same offense." *Abney v. United States*, 431 U.S. at 660-61 (emphasis added). As decided in *Ashe*, the same rationale precludes the retrial of critical issues of fact once determined favorably to a criminal defendant.

The court below did not recognize that the guarantee against double jeopardy "thus protects interests wholly unrelated to the propriety of any subsequent conviction." *Abney v. United States*, 431 U.S. at 661. Instead, by employing an incorrect standard for judging whether to entertain an interlocutory appeal, and by postponing consideration of petitioner's interlocutory appeal until the case had been retried, the Fourth Circuit subjected petitioner to the danger that *Ashe* explicitly protects against: "having to 'run the gantlet' a second time." 397 U.S. at 446 (citation omitted). In the process, the court of appeals created a conflict with other circuits.

It is inherent in the idea of an appellate court that possible errors of a trial court should be reviewed by a detached and objective tribunal. Having denied petitioner's request for immediate interlocutory consideration of his double jeopardy claims, while retaining jurisdiction over the interlocutory appeal, the Fourth Circuit was hardly in a position to accord such review to those claims after retrial, since a conclusion that petitioner's claims were meritorious would have amounted to a conclusion that the Fourth Circuit itself had erred. In the unique context of double jeopardy, the denial of an interlocutory appeal is tantamount to a denial of the underlying claim. If the court of appeals had accorded immediate interlocutory review to petitioner's claims, its more detached perspective might have allowed a different conclusion.

A. The Denial of the Double Jeopardy Claims Was a Final Order, Appealable Under *Abney v. United States.*

Abney was a "pure" double jeopardy case, and thus this Court did not address in *Abney* the extent to which interlocutory appeals are available for collateral estoppel claims implicating the Double Jeopardy Clause under *Ashe*. This unaddressed issue has caused considerable confusion, which led the Fourth Circuit to limit *Ashe* strictly to its factual context and hold that "double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible." *Head II*, 697 F.2d at 1205, App. A, *infra*, 7a. The court of appeals went on to hold:

> Here, even if collateral estoppel were applied as [petitioner] contended it should be, its effect could only have been to limit proof of the tax object of the conspiracy, not absolutely to prevent conviction of the conspiracy count. Other objects remained upon which conviction could have been based. Accordingly, [petitioner's] collateral estoppel claim on its face did not invoke double jeopardy protections under *Ashe*.

Id. at 1206, App. A, *infra*, 7a-8a.

Applying this restrictive theory, the Fourth Circuit seems to have followed the approach of some circuits that distinguish between the interlocutory appealability of "ultimate" facts and "evidentiary" facts. As explained by the Fifth Circuit:

> First, collateral estoppel may completely bar a subsequent prosecution where, for instance, an earlier acquittal necessarily places the defendant away from the scene of the crime . . . . In a second group of cases, although the subsequent prosecution may proceed, collateral estoppel operates to bar the introduction or argumentation of certain facts necessarily established in a prior proceeding.

United States v. Mock, 604 F.2d 336, 338 (5th Cir. 1979). The circuit courts are in conflict as to the interlocutory appealability under *Abney* of rulings falling into the latter situation. *Compare: id.* (collateral estoppel claims that would not completely preclude conviction held not immediately appealable) and *United States v. Powell*, 632 F.2d 754, 758 (9th Cir. 1980) (denial of motion to strike only two of numerous overt acts in furtherance of a conspiracy held not an appealable "final decision") with *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979) (interlocutory appealability assumed when collateral estoppel claim would merely restrict evidence and not bar conviction), *modified on other grounds*, 611 F.2d 585 (5th Cir.), *cert. denied*, 446 U.S. 939 (1980) and *United States v. DeVincent*, 632 F.2d 155, 160-61 & n.10 (1st Cir. 1980) (interlocutory appeal heard even though defendant's claim might control only a single element of a count), *cert. denied*, 450 U.S. 984 (1981).

The Fourth Circuit's approach is puzzling because this case actually involves not evidentiary, but ultimate facts. Petitioner moved both the district and the circuit courts to estop relitigation of the *entire tax object* of the dual-object conspiracy or, in the alternative, to estop introduction of the only two overt acts alleged in furtherance of the tax object of the conspiracy. The success of either of these motions would have completely precluded relitigation of the tax object, since no other overt acts

were alleged regarding the tax conspiracy. The Fourth Circuit held, in effect, that even if a factual resolution was necessarily the basis of a decision in a defendant's favor, that resolution is merely evidentiary if, in a subsequent trial, an alternative basis for conviction is also alleged. In fact, the proper test for whether a factual issue is ultimate should be whether it would bar any single, discrete basis for reconviction.

Abney, in any event, does not distinguish between the interlocutory appealability of ultimate and evidentiary facts.[14] This Court made no distinction in *Ashe* between the preclusion in subsequent trials of ultimate and evidentiary issues, and there is no logical reason to read such distinctions into *Abney*. The fact that many courts have done so makes further guidance by this Court imperative.

B. The Pendency of Petitioner's Request for Interlocutory Review Divested the Trial Court of Jurisdiction.

Ordinarily, a trial court loses its power to proceed once a party files a notice of appeal. 9 J. Moore, *Moore's Federal Practice* ¶ 203.11 (2d ed. 1982) (and cases cited therein). An *Abney* interlocutory appeal raising double jeopardy issues will, by necessity, delay trial. *United States v. DiLapi*, 651 F.2d 140, 144-45 (2d Cir. 1981), *cert. denied sub nom. Ladmer v. United States*, 455 U.S. 938 (1982), *cert. denied*, 459 U.S.____, 102 S. Ct. 1428 (1982). Recognizing that fact and the importance

[14]Although the *Abney* opinion indicates that the denial of a motion to suppress illegally seized evidence would not be subject to immediate review, 431 U.S. at 659 (citing *Dibella v. United States*, 369 U.S. 121 (1962); *Cogen v. United States*, 278 U.S. 221 (1929)), collateral estoppel—double jeopardy claims raise different considerations. While the introduction of illegally procured evidence can be properly challenged as late as during post-trial proceedings so as to fully vindicate a defendant's Fourth Amendment protections, the suppression of evidentiary facts or issues that a defendant seeks to estop collaterally can properly be challenged only before trial if the defendant is to be protected from "having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. at 446.

of orderly and efficient judicial administration, this Court in *Abney* suggested, without specifying explicit standards, that the courts of appeals adopt expedited means of handling double jeopardy appeals and summary procedures to eliminate frivolous claims. 431 U.S. at 662 n.8.

This suggestion has led several circuits to hold that district courts are not divested of jurisdiction by "frivolous" *Abney* appeals. Because the constitutional right to avoid prior jeopardy is, however, irretrievably lost if a district court erroneously denies a double jeopardy claim and proceeds to trial, these circuits also require that an appeal be totally frivolous and that the district court make explicit findings to support its determination of frivolousness if jurisdiction is to be retained in that court.[15]

In *United States v. Dunbar*, the Fifth Circuit analogized double jeopardy claims to appeals from denial of bail, *Stack v. Boyle*, 342 U.S. 1 (1951), and to appeals from denials of permission to proceed *in forma pauperis*, *Coppedge v. United States*, 369 U.S. 438 (1962). 611 F.2d 985, 988 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926 (1980). Those appeals also are based on important constitutional rights that, if erroneously denied, are irretrievably lost on later appeal; yet in such appeals district courts have the power initially to determine whether the appeal is dilatory and frivolous. As in those analogous appeals, *Dunbar* grants the district court power to make an initial determination but also requires speedy disposition of the appeal and written findings by the district court to safeguard against errors.[16]

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[15] *United States v. Dunbar*, 611 F.2d 985, 989 (5th Cir.) (en banc), *cert. denied*, 447 U.S. 926 (1980); *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980) (following the Fifth Circuit in *Dunbar*); *United States v. Hines*, 689 F.2d 934, 937 (10th Cir. 1982) (requiring the district court's finding of frivolousness to be for "substantial" reasons); *United States v. Grabinski*, 674 F.2d 677, 679 (8th Cir.) (requiring expedited appellate review in conjunction with district court's written determination of frivolousness), *cert. denied*, 459 U.S.____, 103 S. Ct. 67 (1982). *But see United States v. Burt*, 619 F.2d 831, 838 n.10 (9th Cir. 1980) (suggesting imposition of sanctions by court of appeals for frivolous appeals is an effective substitute for requiring that the district court determine frivolousness).

[16] For appeal of denial of bail, see Fed. R. App. P. 9(a) advisory committee note: "Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision." *See also Stack v. Boyle*, 342 U.S. at 4.

The court below, however, went much further than even those circuits that have adopted *Dunbar*,[17] because it did not offer the petitioner the limited safeguards of expedited review and written findings by the district court.[18] Moreover, the court of appeals itself did not offer any findings or conclusions until after the second trial. The court of appeals' retroactive characterization of its earlier denial of a stay as a summary disposition of the double jeopardy claim came too late to prevent petitioner's counsel, government counsel, and the trial judge from debating the merits of the double jeopardy claims at trial as specific evidence of the tax object was introduced, or in lengthy post-trial briefs in the court of appeals itself. Indeed, the court of appeals followed an inherently self-contradictory course; it decided that petitioner could not properly appeal, while it simultaneously decided the appeal.

This approach demonstrates that the interplay between *Abney* appeals and the collateral estoppel component of double jeopardy requires clarification. Courts of appeals facing *Abney* claims must know when they are required to hear them and when they are not. The present court of appeals' decision represents a serious erosion of the right to interlocutory appeal of a double jeopardy claim and, in addition, reveals that judicial economy, for which the right is being sacrificed, is also being poorly served.

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[17] The court of appeals purported to rest its refusal to entertain the interlocutory appeal on *Dunbar*, however. *Head II*, 697 F.2d at 1204 n.4, App. A, *infra*, 5a. As indicated below, there is no support in these cases for the actual standard that the court employed.

[18] Even these safeguards may not be sufficient. The Fifth Circuit recently held that a district court's erroneous determination of frivolousness was unreviewable because the only recourse after trial was "the anomalous prospect of 'protecting' double jeopardy rights by ordering yet a third trial." *United States v. Kalish*, 690 F.2d 1144, 1154 (5th Cir. 1982), *cert. denied*, 459 U.S.____, 103 S. Ct. 735 (1983).

C. The Court Below Applied an Improper Standard of "Frivolousness."

The Fourth Circuit implied in its decision that "frivolousness" in an *Abney* appeal may have a meaning different from frivolousness generally. *Head II*, 697 F.2d at 1204-06, App. A, *infra*, 6a-8a. This is a wholly novel theory. Even if the *Dunbar* line of cases is correct in allowing a district court to retain jurisdiction when a frivolous double jeopardy claim is raised, the standard for determining frivolousness is critical to the protection of a defendant's *Abney* interests.

As noted, the *Dunbar* line of cases has adopted the test of frivolousness that is employed in evaluating motions for leave to appeal *in forma pauperis*, 28 U.S.C. § 1915(a), and from denial of bail, 18 U.S.C. § 3148. *United States v. Dunbar*, 611 F.2d at 988; *United States v. Hines*, 689 F.2d 934, 937 (10th Cir. 1982); *United States v. Grabinski*, 674 F.2d 677, 679 (8th Cir.), *cert. denied*, 459 U.S. ____, 103 S.Ct. 67 (1982). In the analogous circumstance of leave to appeal *in forma pauperis*, the lower courts have been guided by *Coppedge v. United States*, in which this Court held that an appeal is not frivolous when a rational argument is made on the law or facts. 369 U.S. at 446. In the Fifth Circuit, the test for frivolousness for evaluating an appeal to proceed *in forma pauperis* is whether a claim is "without arguable merit." *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976). A district court in the Fifth Circuit has logically applied this test in determining that an interlocutory appeal involving double jeopardy per *Abney* was not frivolous. *United States v. Bizzard*, 493 F. Supp. 1084, 1086 (S.D. Ga. 1980), *aff'd*, 674 F.2d 1382 (11th Cir. 1982), *cert. denied*, 459 U.S. ____, 103 S. Ct. 305 (1982).

Although it purported to follow *Dunbar* in the present case, *Head II*, 697 F.2d at 1204 n.4, App. A, *infra*, 5a, the Fourth Circuit's test for evaluating "frivolousness" for leave to appeal *in forma pauperis* is whether a district court finds "beyond doubt" that the defendant's claim is without arguable merit on facts or law. *Boyce v. Alizaduh*, 595 F.2d 948, 952 (4th Cir. 1979). Neither the district court nor the court of appeals applied even a remotely similar test in the present case.

Instead, the court of appeals here suggests that frivolousness may be of two types. First, a claim may manifestly involve double jeopardy in content, but be entirely lacking in merit. Second, a claim may simply and manifestly not involve double jeopardy in content. *Head II*, 697 F.2d at 1204-05, App. A, *infra*, 6a. The court concluded that petitioner's claims were of the second type, not "true double jeopardy claims." *Id.* at 1205, App. A, *infra*, 6a. The court based its decision on a theory that there cannot be true double jeopardy unless the facts to be collaterally estopped are so critical as to absolutely bar a second prosecution, a conclusion apparently never before reached in the Fourth Circuit and in conflict with decisions in numerous other federal circuits. The label of "not true double jeopardy" opens the door to conclusory analysis based on novel theories. As discussed above, petitioner's claims, if granted, would have entirely precluded retrial on the tax object of the alleged conspiracy. Thus, petitioner's claims were "manifestly double jeopardy in substantive content" and, on their face, gave rise to a right to an interlocutory appeal under *Abney*.

CONCLUSION

In view of the erroneous refusal by the court of appeals to provide immediate interlocutory review of petitioner's motion to collaterally estop the relitigation of the tax object of the conspiracy, the erroneous denial of the merits of petitioner's claims, and the internally inconsistent theory applied by the court of appeals in issuing that denial, the Court should allow the writ of certiorari and grant summary reversal of the decision of the court below.

Respectfully submitted,

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April 9, 1983

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APPENDIX A*

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 81-5123

UNITED STATES OF AMERICA,

Appellee,

versus

MURDOCK HEAD,

Appellant.

No. 81-5184

UNITED STATES OF AMERICA,

Appellee,

versus

MURDOCK HEAD,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Argued July 15, 1982 Decided December 30, 1982
Rehearing and Rehearing
En Banc Denied February 10, 1983

Before WINTER, Chief Judge,
PHILLIPS and ERVIN, Circuit Judges.

Frank W. Dunham, Jr. (Brian P. Gettings, Wallace H. Kleindienst, William L. Jacobson, Leonard, Cohen, Gettings &

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* This case has been printed from the slip opinion of the Fourth Circuit rather than the Federal Reporter opinion recently published. The published and slip opinions are identical, except for slight variations in the form of the citations.

Sher on brief) for Appellant; David B. Smith, Assistant United States Attorney, Theodore S. Greenberg, Assistant United States Attorney (Justin W. Williams, United States Attorney on brief) for Appellee.

PHILLIPS, Circuit Judge:

These are consolidated appeals by Dr. Murdock Head from an interlocutory pre-trial order denying his "double jeopardy" pleas, No. 81-5123, and from a final judgment of conviction on a two-count indictment charging conspiracy to bribe and to evade taxes and a substantive illegal gratuity offense, No. 81-5184. We find no merit in either Head's "double jeopardy" claims or in numerous assignments of error related to the prosecution and trial of the case, and therefore affirm the conviction.

I

The essential factual background of this appeal is related in *United States v. Head*, 641 F.2d 174 (4th Cir. 1981). We summarize only its more critical features here.

Murdock Head was Executive Director of the Airlie Foundation until indicted in 1979. The Foundation, a tax exempt educational association which conducts seminars and produces documentary films, subcontracted its film-making work to Raven's Hollow Limited, a taxable enterprise formed by Head. The Foundation received substantial federal monies from a House of Representatives Subcommittee chaired by Congressman Daniel Flood.

Head was first convicted and sentenced to three years' imprisonment in the fall of 1979 under an indictment containing thirteen counts, one of conspiracy and the others of various substantive offenses. He was found guilty only on the conspiracy count which alleged a single conspiracy with three illegal objects: (1) the bribery of Congressman Flood and his aide, Steven Elko (the "Flood/Elko object"); (2) the giving of

a thing of value to Jesse Hare, an Internal Revenue Service agent (the "Hare object"); and (3) the evasion of Raven's Hollow Limited's federal income taxes (the "tax object"). One substantive count was dismissed upon motion of the government. Four others concerning Head's dealings with IRS agent Hare were dismissed by the district court after the government had presented its case. The district court also dismissed four of the six counts dealing with substantive tax violations in connection with the Raven's Hollow returns, and the jury acquitted Head on the other two substantive tax counts.

On Head's appeal from his conspiracy conviction, we reversed and granted a new trial, *United States v. Head*, 641 F.2d 174 (4th Cir. 1981), on the basis that the jury had not been instructed on the statute of limitations and hence might have predicated its guilty verdict on events occurring outside the applicable period.

The second trial, from which the present appeals arise, was not merely a retrial on the conspiracy count of the original indictment. Following remand, the government reduced the scope of the conspiracy count by eliminating the Hare object.[1] On the other hand, the government—with Head's consent—added a substantive "gratuity" count alleging a violation of 18 U.S.C. § 201(f).

Prior to the second trial, Head filed a motion *in limine* in the district court, seeking to strike the tax object of the conspiracy count along with related overt acts, and to preclude the government from introducing proof to support those allegations. Moreover, Head moved to dismiss the entire indictment,[2] arguing both that application of collateral estoppel principles rendered the conspiracy count duplicitous and that double jeopardy barred retrial on the conspiracy count because prose-

[1] The government acquiesced in a suggestion by the district judge that it should not attempt to prove the Hare object of the conspiracy because in all likelihood the judge would dismiss that object at the end of the trial.

[2] Head sought dismissal of the entire indictment in the district court on May 15, 1981. The information charging a substantive gratuity count under 18 U.S.C. § 201(f) was not filed and consolidated with the conspiracy count until May 18, 1981.

cutorial misconduct in the first trial had preserved trial court error in the jury instructions on the statute of limitations.

The district court denied the motions, and Head noticed an interlocutory appeal and sought a stay of the trial court proceedings pending the appeal. Following district court refusal of a stay, we also declined to grant the stay or then to entertain the appeal, and Head's trial began eight days later.

The jury returned a general verdict of guilty on both the conspiracy count and the substantive gratuity count. Head then noticed an appeal from the final judgment, which, as earlier indicated, we then consolidated with his earlier interlocutory appeal.

On these appeals, Head makes the following contentions: (1) under *Abney v. United States*, 431 U.S. 651 (1977), his interlocutory appeal from denial of his "double jeopardy" objections gave rise to a right to immediate review and divested the trial court of jurisdiction to proceed with trial pending that review;[3] (2) his "double jeopardy" rights were in any event violated by putting him to second trial, so that his conviction must be reversed; (3) specific rulings and the overall conduct of the trial judge constituted reversible error; and (4) the evidence adduced at the second trial was insufficient to support the conviction on either count.

II

When we declined on Head's interlocutory appeal in No. 81-5123 to review on the merits his denied "double jeopardy" claims or to grant his requested stay of trial pending appeal, the effect, as intended, was to dispose summarily of those claims on

[3] The "lack of jurisdiction" element of this contention rises or falls with the more fundamental contention that *Abney* gave rise to an enforceable right to interlocutory review of the denial of the "double jeopardy" objections.

Because in Part II we reject the contention that in this case any such special right to review could have existed, the "lack of jurisdiction" argument falls with it.

the basis that, as double jeopardy claims, they were frivolous. *See Abney*, 431 U.S. at 662 n.8.[4]

We issued no written opinion at that time but retained jurisdiction of that appeal while the second trial proceeded and later consolidated the interlocutory appeal with the appeal from final judgment in No. 81-5184. We write now to give our reasons for that summary disposition of the interlocutory appeal.[5]

The three "double jeopardy" claims presented and denied on Head's motion *in limine* in the district court were based, respectively, on collateral estoppel, prosecutorial misconduct, and duplicitousness of the second trial indictment. On the basis of the motion papers upon which these claims were advanced in the district court,[6] we considered each to be "frivolous" in the sense contemplated by the *Abney* decision, so that interlocutory review of their denial was properly refused.

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[4] In the cited footnote, the *Abney* Court observed that in administering its announced rule of interlocutory appealability of double jeopardy claims, the courts of appeals might "establish summary procedures and calendars to weed out frivolous claims of former jeopardy." *See also United States v. Leppo*, 634 F.2d 101 (3d Cir. 1980) (district court retains jurisdiction when defendant notices appeal raising a frivolous double jeopardy claim); *United States v. Dunbar*, 611 F.2d 985 (5th Cir.) (same), *cert. denied*, 447 U.S. 926 (1980).

[5] Because of our holding that the claims were "frivolous" in the *Abney* sense, we need not address Head's novel contention that if they were not "frivolous" he is entitled to reversal of his conviction even if the claims were ultimately found to be without merit. This draconian theory builds off language in *Abney* arguably suggesting that interlocutory review of denied double jeopardy claims may be a matter of constitutional right because review at that stage is necessary to protect against second trials barred by double jeopardy. *See Abney*, 431 U.S. at 660, 662.

We observe of this draconian theory only that it flies in the face of the *Abney* Court's introductory admonition that "there is no constitutional right to an appeal" and the corollary that "[t]he right . . . , as we presently know it in criminal cases, is purely a creature of statute." 431 U.S. at 656. *See People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 537-39, 387 N.E.2d 325, 329-31, *cert. denied sub nom. Mosley v. Illinois*, 444 U.S. 940 (1979).

[6] They were before us as portions of the record on appeal in No. 81-5123.

Our analysis proceeded on the assumption that "frivolousness" in the *Abney* sense must embrace both a perception that a claim that is manifestly "double jeopardy" in substantive content is wholly lacking in merit, and a perception that a claim advanced as one of "double jeopardy" is manifestly not that in substantive content. On this basis, for reasons that follow, we considered none of the claims to be true double jeopardy claims, without regard to their degree of apparent merit on grounds other than double jeopardy.

A

Head's primary "double jeopardy" claim was that his first trial acquittal—by court dismissal and jury verdict—on all the substantive tax offenses precluded his reprosecution on the tax object and related overt acts in the conspiracy count remanded for retrial. Under *Ashe v. Swenson*, 397 U.S. 436 (1970), he contends, the factual determinations necessarily implicit in his acquittal must be given collateral estoppel effect which, per *Ashe*, is constitutionally guaranteed by the Double Jeopardy Clause.

Ashe did of course hold that principles of collateral estoppel which had long been applied as an "established rule of federal criminal law," *id.* at 445, were actually "embodied in the Fifth Amendment guarantee against double jeopardy," *id.* at 443, and that on the facts of that case their application barred a second trial. But the holding was in a context where a fact necessarily determined in the defendant's favor by his earlier acquittal made his conviction on the challenged second trial for a concededly different offense impossible unless the fact could be relitigated and determined adversely to the defendant.[7] In such a context, despite the technical difference be-

[7] On first trial defendant was acquitted, by general verdict of not guilty, of a charge of robbing *A*. The first trial record revealed that this necessarily involved a determination that defendant was not a participant in the single-episode robbery of *A*, *B* and others. The challenged second trial involved a charge that defendant had in that same episode robbed *B*.

tween the two offenses, the guarantees of the Double Jeopardy Clause against being required to " 'run the gantlet' a second time," *id.* at 446, or being subjected to the "hazards of trial and possible conviction more than once," *id.* at 447 (Black, J., concurring), were held to preclude relitigation of the critical fact so that the second prosecution must be absolutely barred. *See also Phillips v. United States*, 502 F.2d 227 (4th Cir. 1974), *vacated on other grounds*, 518 F.2d 108 (4th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).

We understand the holding in *Ashe* to be limited to its factual context, so that double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible.[8] Since successful interlocutory appeal from denial of such a collateral estoppel claim could only lessen and not wholly remove the possibility of conviction and lesser associated hazards of being again tried, *see Abney*, 431 U.S. at 661-62, no constitutional, as opposed to legal, right is at stake in such a claim. *See id.* at 659 (contrasting, for appealability purposes, double jeopardy and evidence suppression rulings); *United States v. Powell*, 632 F.2d 754, 758 (9th Cir. 1980) (refusal to limit proof on collateral estoppel grounds not immediately appealable); *United States v. Mock*, 604 F.2d 336, 338-40 (5th Cir. 1979) (same); *but cf. United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979) (interlocutory appealability assumed though collateral estoppel would merely restrict proof), *modified on other grounds*, 611 F.2d 585 (5th Cir.), *cert. denied*, 446 U.S. 939 (1980); *United States v. DeVincent*, 632 F.2d 155, 160-61 & n.10 (1st Cir. 1980) (same, though distinction between proof-limiting and double jeopardy-collateral estoppel recognized), *cert. denied*, 450 U.S. 984 (1981).

Here, even if collateral estoppel were applied as Head contended it should be, its effect could only have been to limit proof of the tax object of the conspiracy, not absolutely to

[8] Judge Adams' comment in *Phillips*, 502 F.2d at 230 n.14 (sitting by designation), that collateral estoppel appeared "coextensive" with double jeopardy principles, is not at odds—viewed in context—with the distinction we draw. In *Phillips*, as in *Ashe*, it was "coextensive" on the facts.

prevent conviction on the conspiracy count.[9] Other objects remained upon which conviction could have been based. Accordingly, Head's collateral estoppel claim on its face did not invoke double jeopardy protections under *Ashe*.

B

Head's next "double jeopardy" objection was that because the error that led to reversal of his first conviction—failure to instruct properly on the statute of limitations—was "knowingly" induced by prosecutorial misconduct, his retrial should be barred.

Prosecutorial misconduct may undoubtedly invoke double jeopardy protections—as opposed to possible due process protections—in two situations: where it leads a court *sua sponte* to declare a mistrial as a matter of "manifest necessity," *United States v. Dinitz*, 424 U.S. 600, 608 (1976); or where it has, by intention of the prosecutor, goaded a defendant into seeking a mistrial that is then granted on his motion, *Oregon v. Kennedy*, 102 S. Ct. 2083, 2088 (1982). In either situation, double jeopardy protections are engaged because the misconduct has involuntarily deprived the defendant of the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

Here, trial before the first tribunal had been completed with no request for mistrial having been made. The suggestion of prosecutorial misconduct was only raised after defendant's

[9] Head attempts to distinguish, for this purpose, mere evidence-limiting collateral estoppel from collateral estoppel that would preclude the establishment of a "discrete basis" for a jury verdict. The latter, he claims, if not the former, rises to the level of "double jeopardy-collateral estoppel." This attempted distinction is one without a difference. The true distinction occurs, as indicated, at the point where the preclusion would run to reprosecution of a discrete criminal "offense." On this basis it might of course run to only one of multiple counts of an indictment, *see, e.g., Price v. Georgia*, 398 U.S. 323, 331 (1970); *Green v. United States*, 355 U.S. 184, 189-91 (1957), but it could not run to any mere evidence-limiting or "discrete basis" objection related to an otherwise provable criminal "offense."

appeal had secured a retrial because of trial court error that was found independently of any prosecutorial misconduct in its inducement.[10] In that situation no double jeopardy right of the defendant had been implicated, and this was manifest when the motion *in limine* was denied. Accordingly, as with the collateral estoppel objection, this one on its face did not invoke double jeopardy rights entitling Head to interlocutory review under *Abney*.[11]

C

Head's final "double jeopardy" objection was a convoluted one that built off his collateral estoppel contention. If the tax object was barred by collateral estoppel from reprosecution, he argued, this removed the only link between the "Hare object" and the "Elko object" of the conspiracy as originally charged that had made it a single conspiracy with multiple objects rather than three separate conspiracies. On this basis, the single conspiracy count was now made duplicitous by charging two separate conspiracies. This raised an "adjunct double jeopardy

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[10] We are aware of three circuit decisions containing suggestions that where a defendant secures reversal of his conviction because of prosecutorial misconduct following denial of his trial court motion for mistrial on that ground, double jeopardy protections might bar his retrial. *See United States v. Rios*, 637 F.2d 728, 729 (10th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981); *United States v. Opager*, 616 F.2d 231, 236 n.13 (5th Cir. 1980); *United States v. Heymann*, 586 F.2d 1039, 1040 (5th Cir. 1979) (Hill, J., concurring).

Whether this situation, as well as those in which mistrial has been granted, engages double jeopardy protections, we need not address, since it is not presented here. *Cf. Oregon v. Kennedy*, 102 S. Ct. 2083, 2090 n.6 (1982); *Burks v. United States*, 437 U.S. 1, 15 (1978).

[11] We are aware that the Ninth Circuit has held that under *Abney's* rationale—though not by its specific holding—the denial of pre-trial claims of prosecutorial misconduct are immediately appealable though no double jeopardy rights are involved. *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980). With respect, we find the contrary views of the Fifth Circuit, *see United States v. Gregory*, 656 F.2d 1132 (5th Cir. 1981), and of the Seventh Circuit, *see United States v. Rosario*, 677 F.2d 614 (7th Cir. 1982), more persuasive.

bar" whose rejection by the district court gave rise under *Abney* to a right to interlocutory review.

Again reserving all questions of the merits of the duplicitousness contention, the context in which it was raised in this case could not have invoked the double jeopardy protections with which *Abney* was concerned.

Abney itself reveals the only context—a different one than that here—in which a claim of duplicitousness could invoke double jeopardy protections against a second trial. In that case a first trial conviction by general verdict of guilty had been reversed on appeal. In remanding, the court of appeals, finding the indictment to have been duplicitous, ordered an election before retrial. Following the election and before retrial, the defendant raised a double jeopardy claim on the basis that the general verdict was necessarily ambiguous on the question whether the jury might have acquitted him of the single offense with which he was now charged under the election and found him guilty only on the now-dropped other offense. The double jeopardy right invoked was therefore the right not to be tried again for the same offense, with questions of ambiguity resolved in the defendant's favor. *See Abney*, 431 U.S. at 664. Assuming, without deciding, that such a claim of ambiguity might invoke the double jeopardy right in an appropriate case, *id.*, the *Abney* Court found that it was not invoked in the case at hand because of jury instructions that removed any possibility of ambiguity, *id.* at 664-65.

In the instant case, this was manifestly not the context within which the objection of duplicitousness was raised. Here there had been no prior conviction by arguably ambiguous general verdict on an arguably duplicitous indictment. There was only an impending trial on an arguably newly duplicitous indictment. Double jeopardy does not protect against the mere possibility that a duplicitous indictment may result in an ambiguous general verdict of conviction that will then be followed by reversal and retrial upon an offense of which the jury may actually have acquitted.

Accordingly, this objection also did not on its face invoke any double jeopardy rights with whose protection by interlocutory appeal *Abney* was concerned.

III

We turn now to the merits of the set of "double jeopardy" objections which, though not subject to interlocutory review under *Abney*, are nevertheless properly presented for review on Head's appeal from the final judgment of conviction.

A

In that setting, we address Head's claim of collateral estoppel under the longstanding rule of federal practice applying this branch of res judicata doctrine to criminal cases. *See Ashe*, 397 U.S. at 443. If Head was entitled by it to a limitation of proof that was denied and that prejudiced his trial, his judgment of conviction must be reversed. We conclude, however, that collateral estoppel did not require any limitation of proof.

The essence of the collateral estoppel claim is that Head's acquittal at his first trial on the substantive tax counts of the indictment precluded government attempts at the second trial to prove the tax object of the conspiracy, particularly the averments of Overt Acts 19 and 20.[12] To assess this contention, we must examine the bases for Head's acquittals on the substantive counts, taking heed of the Supreme Court's admonition that we "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444.

Head's acquittals on the substantive tax counts may be grouped into two categories. Three false filing counts, alleging

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[12] Overt Act 19 alleged:

> On or about May 2, 1975, Murdock Head caused to be prepared, signed and mailed from Airlie, Virginia to the Internal Revenue Service Memphis Service Center, Memphis, Tennessee, a corporation income tax return in the name of Raven's Hollow for the fiscal year 1974.

Overt Act 20 was virtually identical, except that it pertained to fiscal year 1975, and to acts occurring on or around May 18, 1976.

violations of 26 U.S.C. § 7206(2), were dismissed by the trial judge at the close of the government's case-in-chief. The record makes quite apparent that the trial court dismissed these counts because the government had failed to prove that Head had actually prepared the Raven's Hollow tax returns at issue.[13] This basis for dismissal did not establish in Head's favor any fact relevant to and necessarily at issue in relitigation of the averments contained in Overt Acts 19 and 20. *See United States v. Scott*, 437 U.S. 82, 97-98 & nn.9 & 11 (1978).

The second set of substantive tax counts alleged that Head had aided and abetted the evasion of income taxes by Raven's Hollow, in violation of 26 U.S.C. § 7201. The jury acquitted Head on two of these three counts, and the trial judge acquitted Head of a third count on which the jury had hung.[14]

Head's argument that these acquittals should have precluded the government from introducing evidence on Overt Acts 19 and 20 misapprehends collateral estoppel doctrine. Head contends it is *possible* that the first jury established the factual averments of Overt Acts 19 and 20 in his favor; collateral estoppel applies, however, only to facts *necessarily* determined in the defendant's favor. *United States v. Nash*, 447 F.2d 1382, 1385 (4th Cir. 1971); *accord United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981).

In order to find Head guilty on the counts alleging violations of § 7201, the jury was instructed that the amount

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[13] This ruling was clearly contrary to decisions by numerous circuits holding that § 7206(2) applies to individuals who are involved in the concealment of a taxable business interest, even if they do not actually prepare the tax return. *See, e.g., United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976).

[14] The government's evidence on these three tax counts was essentially identical, except that the amount of net tax due varied between years. The jury acquitted Head on the counts relating to tax years 1974 and 1975, when the amounts evaded were alleged to be relatively small: $9,294 and $6,249, respectively. In contrast, the jury was hung on the count relating to tax year 1976, when the amount evaded was allegedly $43,695.

evaded had to be "substantial." *See United States v. Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Given that this factual issue was hotly disputed on the evidence presented at trial, it cannot be true that Head's acquittals on these counts necessarily determined the allegations of Overt Acts 19 and 20 in his favor. The jury verdicts—and the court's treatment of the count on which the jury had hung—obviously could have been predicated solely on the amount of tax evaded.[15] In this circumstance, Head simply has not carried the substantial burden of showing that these factual issues were necessarily determined in the earlier trial. *See United States v. Giarratano*, 622 F.2d 153, 156 n.4 (5th Cir. 1980); *United States v. Barket*, 530 F.2d 181, 188 (8th Cir. 1975), *cert. denied*, 429 U.S. 917 (1976).

B

We find no merit in Head's contention that because prosecutorial misconduct induced the trial court error leading to reversal of his first trial conviction, his second conviction should now be set aside. We need go no further than to reject the premise that there was any prosecutorial misconduct in the respect claimed.

The specific contention is that after originally requesting an instruction on the statute of limitations defense to the con-

[15] Head's claim of collateral estoppel is therefore readily distinguished from those made in other cases where a general jury verdict of acquittal has precluded the relitigation of factual issues necessarily decided in the defendant's favor. *See, e.g., Ashe v. Swenson*, 397 U.S. 436 (1970); *United States v. Leach*, 632 F.2d 1337 (5th Cir. 1980); *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979); *Phillips v. United States*, 502 F.2d 227 (4th Cir. 1974), *vacated on other grounds*, 518 F.2d 108 (4th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976). In *Mespoulede*, for instance, the defendant's acquittal on a count alleging possession of cocaine was held to preclude relitigation of the possession issue in a subsequent trial where the defendant was charged with conspiracy to distribute cocaine. Unlike Head's acquittals, however, it was apparent that the defendant's acquittal in *Mespoulede* was based entirely upon the jury's factual determination regarding possession.

spiracy count, the government later successfully objected to the giving of such an instruction. It is claimed that this was for the purpose of inducing error. We have carefully studied the record and are satisfied that the government's reversal of its position reflected no more than a failure of communication within its prosecutorial team and not any manipulative or knowing effort to induce error. Indeed, as we noted in our earlier opinion, "even counsel for the government expressed bewilderment at the court's ruling" on the statute of limitations instruction. *United States v. Head*, 641 F.2d 174, 177 n.3 (4th Cir. 1981).

C

As earlier indicated, *see supra* Part II C, Head's attack on the conspiracy count of the indictment for duplicitousness was premised upon his more fundamental contention that collateral estoppel precluded proof of the tax object of the conspiracy. Without suggesting that if the premise were established the contention of duplicitousness would prevail, it suffices to note that the premise has been rejected. *See id.* With this premise falls any contention that conviction on the conspiracy count must now be reversed for duplicitousness of the indictment.

IV

Head relies heavily upon a contention that the trial judge's overall conduct of the trial so prejudiced him that in total compass it deprived him of due process. The most casual inspection of the record discloses that this serious charge is one not lightly nor irresponsibly advanced by Head's counsel. Nevertheless, we are persuaded upon a careful review of the record that the conduct relied upon did not deny to Head his right to "a fair, as distinguished from a perfect, trial." *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981).

Because of the nature of the contention, it merits some discussion rather than unelaborated rejection. It may properly

be treated as containing two elements: a general pattern of conduct whose overall effect must have been to convey to the jury a sense of the trial judge's bias against Head or Head's defense; and several specific rulings and acts that unmistakably and without any attempt at mitigation or correction must be ascribed that effect in addition to the direct prejudice resulting from them.

We treat these separately.

A

Relying on our decision in *United States v. Cole*, 491 F.2d 1276 (4th Cir. 1974), which, he contends, involved much the same pattern of prejudicial conduct of a trial, Head identifies a general mosaic of harmful interventions and commentary by the trial judge which, he argues, had a "cumulative effect . . . so pervasive and prejudicial that the verdicts cannot stand," *id.* at 1279. Indeed, he claims to have identified in the record a total of 2,470 interjections by the trial judge over the course of the five-day trial, interjections that demonstrably include the berating of witnesses and counsel, the making of frequent *sua sponte* objections to counsel's presentation of the case, and extensive cross-examination of witnesses.

We have not attempted to verify the exact accuracy of this count whose exactness is, in any event, beside the point. It suffices to acknowledge, as we must with the charge responsibly laid before us, that there was in this trial a distressingly frequent exercise of the trial court's undoubted discretionary prerogative—and duty, on appropriate occasions—to intervene *sua sponte* in the proceedings in order to control them.

That some of the interventions were wholly appropriate under the most restrained exercise of the prerogative is clear. That some may even have been induced by deliberate trial tactics is a possibility so patent upon the record that it must be acknowledged in any fair reckoning of cause and effect. After these are conceded, however, the impression remains of a degree of trial judge intrusion that far exceeded the bounds of the model of judicial control of trials rightly aspired to in our adversarial system.

But we review for prejudicial trial court error in the specific case and not, except in the most occasional exercise of our supervisory powers, generally to police the conduct of trials against some general model of judiciousness. And here the specific prejudice suggested is that the overall pattern of intrusions necessarily communicated to the jury such an impression of partiality and outright advocacy on the judge's part that they must have been taken to reflect an underlying belief that the defendant was guilty.

Reviewing the record for that limited purpose we cannot ascribe prejudice to the defendant's fair trial rights from the overall pattern of interventions. A proper view of the matter is, we think, that recurring demonstrations of apparent partiality and disfavor were distributed between the government and the defendant with remarkable, though purely random, evenhandedness—if without a consistent and informed judiciousness. As the government has wryly pointed out in its brief and on oral argument, it could have come off no better than the defendant in the eyes of a jury seeking guidance from the trial judge's apparent degree of favor or disfavor for one side or the other. The judge directed negatively toned remarks at both sides and at counsel for both sides, *see United States v. Johnson,* 657 F.2d 604, 605 (4th Cir. 1981); his frequent asides and his patent overinvolvement in the examination of witnesses cut both ways with an overall impartiality that defies any fine-tuned balancing of harms from the probable impressions conveyed to the jury. Considered in their totality, they probably only conveyed an impression of general irritation and impatience with counsel for both sides and with the whole course of the proceedings.

In sum, the record "neither disclose[s] actual bias on the part of the trial judge nor [does it leave us] . . . with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *United States v. Singer,* 687 F.2d 1135, 1141 n.10 (8th Cir. 1982) (No. 81-1654). For this reason, we find no merit in the contention that prejudice resulted from the overall pattern of the trial judge's conduct of the trial.

B

We turn now to several more specific instances of intervention by the trial judge that Head contends prejudiced him both through the general impression of bias they must have conveyed to the jury and their directly adverse effects.

(1)

Seeking to discredit the critical testimony of Elko as a government witness, Head attempted by cross-examination to establish that Elko was motivated both by a desire for leniency and by resentment at Head's failure to assume Elko's legal expenses. Specifically, he attempted to bring out that Elko had voluntarily made incriminating statements about Head in the prosecutor's office shortly before Elko was to be sentenced for his own conviction.

In a series of rulings that the government candidly concedes were based upon misconstruction both of the relevant facts and the law, the trial judge prevented this line of questioning, commenting erroneously that "Elko said he never cooperated [and he] was immunized, and required by law to testify."

Taken in isolation, this ruling seemingly damaged Head's ability to attack Elko's testimony. Taken in context of the entire trial, however, we agree with the government that the factual elements tending to discredit Elko on the basis of his bias and motivation were otherwise sufficiently established in the record. During cross-examination, Elko admitted both that he sought a reduction of his pending sentence, and that his conversations about Head with federal prosecutors began soon after Head refused to pay $8,000 for legal expenses.[16] If there was error in excluding this line of questioning, it was harmless.

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[16] The trial court also refused to admit into evidence an affidavit executed by Assistant United States Attorney Hinden related to a phone conversation between Hinden and government prosecutor John Dowd concerning conversations between Dowd and Elko. Head contends that this affidavit was erroneously excluded by the trial judge on the theory that it was not an admission by a party-opponent and that it would have shown Elko's volunteering of information about Head in order to obtain leniency from the government. Whether or not the affidavit was properly admissible, Elko's testimony on cross-examination that he sought leniency from the government makes the Hinden affidavit merely cumulative on this point.

(2)

In addition to attacking Elko's bias and motivation, Head sought to confront Elko with numerous prior inconsistent statements. Again, Head's efforts were at least partially frustrated through interventions and rulings by the trial judge, particularly when the court refused to allow Head to pursue a line of inquiry that attempted to establish Elko's knowledge and approval of two FBI reports.[17] The report set forth an interview between Elko and the FBI, and revealed several significant inconsistencies with Elko's trial testimony. The trial judge, however, refused *sua sponte* to allow Head either to question Elko about the FBI report or to allow the FBI agents to use the report to refresh their recollection of this interview.

Government counsel attempted to persuade the trial judge to reverse his rulings on the use of the FBI reports, and ultimately agreed to a stipulation regarding the contents of the reports. Head argues, though, that this was insufficient to remedy the trial judge's prior interference, because government counsel would not agree to language in the stipulation that the "United States Attorney attaches significance to the high reliability and accuracy of these reports." We find no merit in this argument; the trial court emphasized to the jury that the stipulation had to be accepted as true.[18]

(3)

Head contends that his own credibility was the other most glaring casualty of the trial judge's interventions and revealed

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[17] Head claims as well that his attempts to show Elko's prior inconsistent statements were frustrated by the trial court's refusal to admit the Hinden affidavit. *See supra* note 16. In fact, however, Elko admitted the contents of this affidavit during his cross-examination—noting that the newspapers had released the information—but denied making the statements ascribed to him. The credibility issue was thus put squarely before the jury.

[18] Moreover, omission of this language could at most have caused minimal damage to Head's efforts at attacking Elko's credibility on the basis of prior inconsistent statements. There are numerous instances in the record where defense counsel was able to expose inconsistencies between Elko's testimony and his prior statements. In addition, the trial court made clear to the jury that Elko had been convicted of perjury.

misapprehensions. He cites examples where the trial court's interference in the presentation of witnesses—such as during the defense's direct examination of Head and accountant Thomas—allegedly caused the testimony to lose coherence. Moreover, Head argues that he was subjected to cross-examination by the trial judge during his direct testimony, and that his cross-examination must have appeared to be a partnership between the court and the prosecution.

Our examination of the record does not support Head's contentions that the testimony of any of his witnesses became disjointed due to trial court interference. "Although [the trial judge] frequently interrupted witnesses or counsel and sometimes asked questions, his obvious purpose in most instances was to clarify ambiguities or questions raised by the witness' testimony or the counsel's interrogation, which is permissible." *United States v. Robinson*, 635 F.2d 981, 986 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). By the same token, the questioning by the trial judge during Head's direct examination was aimed at clarifying testimony on a series of somewhat bewildering transactions, and did not amount to improper cross-examination.

Finally, we find unsupported by the record the argument that the trial court's frequent interventions made cross-examination of Head appear to be a partnership between judge and prosecutor. The trial court's interventions during Head's cross-examination were primarily of two stripes: attempts to clarify Head's testimony and critical admonitions to the prosecutor. In no realistic sense could this have projected to the jury any impression that the judge had abandoned his rightful role and joined the prosecutor.

V

Head challenges a series of rulings and events occurring at the jury deliberations stage of the proceedings.

A

First, Head complains of the trial court's refusal to give requested instructions pertaining to Head's reliance on book-

keepers and accountants as a defense to the tax object of the conspiracy and to his claimed withdrawal from the conspiracy.

The trial judge refused to give the reliance instruction because in his view it lacked a factual basis in the record. Whether or not this factual assessment was correct, Head was not damaged by the trial court's refusal to give this instruction. The jury instructions emphasized at great length the requirement that there be a willful intent to evade taxes, including that the government had to show Head had "attempted to evade or cause[d] to be defeated" taxes due. Even assuming there was a factual basis for the reliance instruction, we cannot say it would have added appreciably to the jury's understanding of the intent requirement nor of Head's specific theory of defense addressed to it. *See United States v. Stone*, 431 F.2d 1286, 1289, n.9 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

Our review of the record similarly discloses no sufficient evidentiary basis for the requested withdrawal instruction. *See United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980).

B

Second, Head contends the trial court engaged in "verdict urging," *see United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States v. Diamond*, 430 F.2d 688, 695-97 (5th Cir. 1970), by telling the jury that they should choose whether to continue deliberating for another half-hour or to go home immediately and return in the morning.[19] Even though the jury did choose to continue its deliberations and soon returned a verdict, we find no reversible error in the trial

[19] The precise remarks were as follows:

"I will say I don't want to rush you in the slightest. I will stay if any of you want to . . . . I want to be satisfied without rushing any of you. If you can reach a verdict by 6:00 o'clock [then continue your deliberations], otherwise, I prefer you go home now and come back tomorrow morning because I want you to take your time. Let me know what you want to do . . . . I want to make sure I am not rushing anyone. If you want to go home, then [return] tomorrow morning at 10:00 o'clock and then you can take all the time you want."

judge's comments at this stage because he emphasized repeatedly that he was not rushing the jury or placing them under any time constraint.

C

Third, Head urges that his rights under Rule 43 were violated by the handling of an exchange of communications between the judge and jury. After sending the jury back to ponder whether to continue its deliberations, the trial judge received a note from the jury. Without reading the note or entering it formally into the record, the judge revealed to counsel its essential contents: that the jury had decided on two counts and had hung on a third. This of course signalled jury confusion, there being but two counts. The judge solicited advice from counsel, then responded with a note of his own, again without reading it into the record although he made clear its import: that he would take a unanimous verdict on either Count One or Two.

This procedure did not violate the requirements of Rule 43, *see Rogers v. United States*, 422 U.S. 35, 39 (1975), because the contents of the notes, even if not the precise wording, were revealed to counsel, and, more importantly, because the notes dealt not with substantive questions or supplemental jury instructions but rather only informed the judge and jury regarding the state of deliberations.

Finally, Head asserts that prejudicial error arose from what he terms "totally inadequate" efforts by the trial judge to resolve the jury's apparent confusion about whether there were two or three counts at issue. Contrary to Head's contention, the record demonstrates that great care was taken during deliberations to ensure and clarify the jury's understanding of the counts of the indictment.

VI

Head advances as well a welter of additional contentions: *inter alia* that the evidence was insufficient to support the jury verdicts; that the judge erred in refusing to inquire on *voir dire* concerning the venire's attitudes on birth control; that the court erred in refusing to question veniremen individually *in camera*

regarding their exposure to pretrial publicity; and that there was prejudicial error arising from the court's failure to poll the jury about newspaper articles appearing during the trial. We have carefully examined all these arguments and find them without merit.

VII

The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,

FOURTH CIRCUIT

Nos. 79-5293, 5303 and 6727.

UNITED STATES OF AMERICA,
Appellee,

v.

MURDOCK HEAD (3 Cases),
Appellant.

Argued Nov. 13, 1980.

Decided Feb. 9, 1981.

Rehearing Denied April 16, 1981.

Frank W. Dunham, Brian P. Gettings, Washington, D.C. (Wallace H. Kleindienst, Arlington, Va., William L. Jacobson, Third Year Law Student, Leonard, Cohen, Gettings & Sher, Arlington, Va., on brief), for appellant.

David B. Smith, Dept. of Justice, Washington, D.C., Theodore S. Greenberg, Joseph A. Fisher, III, Asst. U.S. Attys., Alexandria, Va. (Justin W. Williams, U.S. Atty., David A. Schneider, Asst. U.S. Atty., Richmond, Va., on brief), for appellee.

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and PHILLIPS, Circuit Judge.

WINTER, Circuit Judge:

Convicted by a jury of conspiracy to achieve three illegal objectives, Murdock Head appeals.* He asserts numerous

* We deal with three consolidated appeals. No. 79-5293 is an appeal from the judgment entered on the verdict; No. 79-5303 is an appeal from the denial of a motion for a new trial; and No. 80-6727 is an appeal from the denial of a motion for new trial based upon newly discovered evidence.

errors in his trial. We agree that the district court committed reversible error when it instructed the jury that it could convict defendant if it found that he conspired to violate any one or more of the three criminal statutes but declined and failed to instruct the jury that it had to find an overt act in furtherance of that conspiracy committed within the applicable period of limitations. We therefore reverse his conviction and award him a new trial. We deal with his other contentions only to the extent that there is a reasonable likelihood that they will arise on retrial.

I.

Head is founder and Executive Director of Airlie Foundation, a tax exempt educational association which produces documentary films. Since its founding in the late 1950's, the Foundation has obtained substantial grants and contracts from the federal government. The Foundation subcontracted its film-making work to Raven's Hollow Limited, a federally taxable entity created by Head in 1963. Much of the federal money received by the Foundation was under the control of a House of Representatives Subcommittee chaired by Congressman Daniel Flood.

The indictment contained thirteen counts. Count one alleged a single conspiracy by Head and fifteen others with the object of committing three offenses: 1) the bribery of Congressman Flood and his aide, Steven Elko, in violation of 18 U.S.C. §§ 201(b) & (f); 2) the giving of a thing of value, *i.e.* a loan of $11,000 at advantageous rates and forbearance in collecting amounts due, to Jesse Hare, an Internal Revenue agent who performed an audit of the Foundation or related entities in 1969 and 1970, in violation of 18 U.S.C. § 201(f); and 3) the evasion of Raven's Hollow's federal income taxes in violation of 26 U.S.C. §§ 7201 and 7206. The jury returned a verdict of guilty on the conspiracy count and Head was sentenced to three years imprisonment.

The second count, alleging that Head paid a $1,000 bribe to Flood in August, 1974, was severed from the remainder of the indictment and later dismissed on the motion of the

government. Counts three through seven, relating to the loan to Jesse Hare, were dismissed by the district court following presentation of the government's case. The district court apparently found either that there was no evidence of forbearance by Head or that forbearance was not a thing of value under 18 U.S.C. § 201(f). The remaining six counts dealt with the tax violations. Four were dismissed by the district court for insufficient evidence. The jury acquitted Head on the other two counts.

Other facts will be stated in conjunction with the contentions to which they relate.

II.

Failure to Instruct on Statute of Limitations

Count one, as we have said, alleged a conspiracy with three unlawful objects. In its charge to the jury, the district court stated:

> The Government . . . does not have to prove that Dr. Head conspired with anyone to . . . violate all of the three laws I have named, but they have to prove beyond a reasonable doubt . . . that he did wilfully and intentionally [conspire to] violate one of the three statutes . . . .

The jury was instructed only to return a general verdict of guilty on the conspiracy count. Head does not argue that the "one is enough" instruction itself was improper. He does contend, however, that, having been given the "one is enough" instruction, the jury could not validly convict him without adequate instructions with regard to each of the criminal objectives of the conspiracy. Head further contends that the district court's instructions regarding two of the objects of the conspiracy—the bribery of Flood and the giving of a thing of value to Hare—were fatally defective because they failed to address the serious statute of limitations problems raised by the allegations of those object crimes.

The government does not dispute the "general rule" that, in order to avoid the five-year statute of limitations for con-

spiracies,[1] it must prove an overt act in furtherance of the conspiracy committed within the limitations period. *See United States v. Davis*, 533 F.2d 921, 926 (5 Cir. 1976). Count one alleged twenty overt acts in furtherance of the conspiracy, only five of which occurred within five years of the indictment. Of those five acts, only three related to the Flood or Hare objects of the conspiracy.[2] In short, with regard to two of the three objects of the conspiracy, the indictment rested in large part on acts occurring without the limitations period. Under these circumstances, there can be no doubt that Head was entitled to an instruction requiring the jury to find an overt act committed within the limitations period before it could find him guilty. The government's only response is that Head failed to request a proper instruction and that any prejudice to Head is too remote to warrant reversal.

The first contention is meritless. The government itself requested the instruction and the defense did not object. After the district court rejected the proposed instruction, defense counsel twice requested the court to instruct the jury that an overt act must be found within the five-year period.[3] Again, after the jury returned a partial verdict acquitting Head on two tax charges, defense counsel repeated his request for the instruction. On each occasion, the district court denied the request.[4]

The government argues that its proposed instruction was erroneous in two respects, both favorable to the defendant, and that the district court was under no obligation to give a

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[1] The limitations period applicable to a conspiracy to violate 18 U.S.C. §§ 201(b) or (f) is five years. *See* 18 U.S.C. § 3282. The period applicable to a conspiracy to violate 26 U.S.C. §§ 7201 or 7206 is six years. *See* 26 U.S.C. §§ 6531(3) and 6531(8). The difference is inconsequential in this case because Head does not contend that a statute of limitations instruction would have been necessary with regard to the Title 26 objectives.

[2] Moreover, Head argues, and the government practically concedes, that the two overt acts relating to the Hare loan were not in furtherance of the conspiracy in any event.

[3] The record indicates that even counsel for the government expressed bewilderment at the court's ruling.

[4] The district court repeatedly expressed the view that "the jury has nothing to do with the statute of limitations."

requested instruction that misstates the law. *See United States v. L'Hoste*, 609 F.2d 796, 805 (5 Cir. 1980). Even if we were convinced that the instruction was inaccurate,[5] however, the government's argument would still fail. We cannot conclude, consistent with our adversary system of justice, that defense counsel must step forward to correct arguable government errors favorable to the defendant.

At oral argument and in a post-argument memorandum, the government belatedly asserts that Head's conviction should stand because "the likelihood that Head was prejudiced by the trial court's failure to give a statute of limitations charge is very slim." The government relies on an extensive list of cases from other circuits which purportedly stand for the principle that "an appellate tribunal must grapple with the often difficult question of how likely it is that such prejudice in fact occurred." Here, we are told, it is overwhelmingly likely either that the jury found that the conspiracy related to tax objects not barred by limitations or that the jury found an overt act in furtherance of the bribery objects within five years of the indictment. Despite the government's urging, we fail to perceive with reasonable certainty the basis for the jury's general verdict.[6]

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[5] The government contends that a five-year period applies only to a conspiracy to violate the bribery laws while a six-year period would apply to a conspiracy with tax objects. *See* note 1, *supra*. While this may be true, we are not convinced that this difference would require the "hybrid" statute of limitations charge suggested by the government. In a multiple-object conspiracy where the object crimes bring into play differing statutes of limitations, the proper course may be to apply the rule of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy.

The government also contends that the jury need not have been instructed to find an overt act *alleged in the indictment* within the limitations period, but could have avoided the bar of limitations by finding unpled acts. We disagree. *See United States v. Davis*, 533 F.2d 921, 929 (5 Cir. 1976). The cases cited by the government deal not with limitations but with the issue of variance between the indictment and proof at trial.

[6] We would add that, from what little we do know of the jury's reasoning in this case, we find the probability of prejudice much more significant than the government suggests. The jury acquitted Head on the only substantive tax counts submitted to it. The likelihood that the jury found a tax object of the conspiracy, therefore, seems somewhat remote. The vast majority of the overt acts alleged with respect to the other two objects were beyond the limitations period. The general verdict provides no assurance that the jury, having found the commission of acts beyond the limitations period, even attempted to reach agreement regarding the more recent acts.

We recognize that there is conflicting authority on this issue. Several circuits have upheld convictions for multiple-object conspiracies even though one or more of the alleged objects failed properly to define a crime. *See, e.g., United States v. Papadakis,* 510 F.2d 287, 297 (2 Cir.), *cert. denied,* 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975); *United States v. Tanner,* 471 F.2d 128, 140 (7 Cir.), *cert. denied,* 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed.2d 220 (1972). Other circuits have rejected the rule. *See, e.g., United States v. Carman,* 577 F.2d 556 (9 Cir. 1978); *United States v. Baranski,* 484 F.2d 556, 560-61 (7 Cir. 1973).

We find the latter series of cases more persuasive. Many of the cases relied upon by the government fail to address the fact that a general jury verdict of guilty may leave a reviewing court uncertain as to which offense or offenses alleged in a multiple-object conspiracy were actually found by a jury. *See, e.g., United States v. Papadakis, supra.* The cases which acknowledge this problem seek to surmount it by asserting that the conviction of the defendant on a particular substantive count indicates that the jury found the defendant conspired to commit the same offense alleged as an object of conspiracy. In such cases courts have upheld conspiracy convictions even though one object of the conspiracy may have been improperly defined because, the opinions assert, the verdict of guilty on a validly-charged substantive count shows that the jury did not ground a conspiracy conviction on an erroneously-defined object crime. *E.g., United States v. Dixon,* 536 F.2d 1388, 1401-02 (2 Cir. 1976).[7] These cases are inapposite here, however, because Head was acquitted of the only substantive counts submitted to the jury.

More significantly, we agree with the Ninth Circuit's view, expressed in *United States v. Carman,* 577 F.2d 556, 566-67 (1978), that *Stromberg v. California,* 283 U.S. 359, 51 S.Ct.

[7] At this time, we need neither approve nor disapprove of the reasoning in these cases. We do note, however, that a verdict of guilty on a substantive offense does not necessarily show that the jury found a conspiracy to commit that same offense where other offenses are also alleged as objects of the conspiracy.

532, 75 L.Ed. 1117 (1931), compels an appellate court to reverse where a general jury verdict renders it impossible to say whether a defendant was convicted under an erroneous or a valid view of the law. In *Stromberg* the jury returned a general verdict of guilty on a count which contained three clauses defining the crime. The jury was instructed that proof of any one of the three defined acts would be sufficient to convict. The Supreme Court declared:

> [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause . . . . [T]he necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

283 U.S. at 368, 51 S.Ct. at 535. In *Yates v. United States*, 354 U.S. 298, 311-312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957), the Supreme Court applied the *Stromberg* doctrine in a conspiracy case raising the same issue that we now decide. In *Yates* several defendants were convicted under the Smith Act of conspiracy to advocate violent overthrow of the government and to organize a society for the purpose of such advocacy. Finding that prosecution of the "organizing" object of the conspiracy was barred by limitations, the Supreme Court applied the *Stromberg* rationale in reversing the conviction:

> [W]e have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the "advocacy" rather than the "organizing" objective of the alleged conspiracy . . . . In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

354 U.S. at 311-12, 77 S.Ct. at 1073.

Stromberg and *Yates* compel reversal of Head's conviction. We simply have no way of knowing whether Head was convicted for an offense barred by limitations.[8] We decline to engage in speculation of this sort in determining guilt in a criminal case.

III.

Other Issues

What we have said is sufficient to decide that Head is entitled to a new trial. It also renders moot his appeal from the denial of his motion for a new trial based upon newly-discovered evidence. But we are constrained to address also other issues which are likely to arise on retrial.

A. *Duplicity of Count One*

Head argues that the government's proof establishes three separate conspiracies rather than a single conspiracy with multiple objects. Viewing the evidence in the light most favorable to the government, we cannot agree. The evidence showed that Head conspired with others to create a "slush fund" to be used in buying the influence of key members of Congress. The manner in which the fund was created resulted in tax violations which Head was obliged to conceal by buying Agent Hare's silence. Even if Hare's audit addressed tax years prior to the activities designed to create the "slush fund," the jury might still conclude that Hare's continued silence was necessary in order to prevent further IRS inquiries which might expose the scheme.

B. *The District Court's Instructions to the Jury*

Head raises a variety of objections to the sufficiency of the jury's instructions, objecting first to the district court's reading of 18 U.S.C. § 201 to the jury rather than setting forth the separate elements of the offense as suggested in an instruction

[8] The parties cite contradictory newspaper articles, each purporting to divulge the true meaning behind the jury's general verdict. This sort of conflict graphically represents the quagmire the government invites us to enter in order to determine the "likelihood" that Head was prejudiced.

proposed by the government. We reiterate what we said in *United States v. Harris*, 346 F.2d 182, 184 (4 Cir. 1965):

> [T]he submission should outline to the jury the elements of the crime. That was not done here. The omission was not supplied by the reading of the statute to the jury. In every criminal prosecution, we have heretofore insisted, an exposition of the constituents of the offense is mandatory and indispensable.

On retrial, Head will be entitled to an exposition of the elements of § 201 and the other crimes with which he is charged.

Head next complains that his proposed instructions regarding campaign contributions were erroneously refused. Defendant's proposed instructions (nos. 9 & 38), however, may have misled the jury into believing anything denominated a "campaign contribution" could not constitute a bribe. Upon retrial, Head would be entitled, upon proper request, to an instruction accurately stating the distinction between lawful "goodwill expenditures" and bribes made with "criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary." *United States v. Arthur*, 544 F.2d 730, 735 (4 Cir. 1976).

Head also objects to the refusal of his instruction that a reasonable "appearance fee" paid to a congressman for attending a banquet would not constitute a "thing of value" under § 201. The government's only response is that "it is obvious" from the evidence that the payment in question was not intended as an honorarium. Elko testified, however, that he gave the money to Flood for the purposes of attending a banquet and that Flood in fact attended. The evidence provides a clear basis for the instruction and it should have been given.

Head submitted an instruction stating that he could not be found guilty of tax evasion if he relied upon accountants to prepare tax returns and did nothing to obstruct the flow of

information necessary to prepare those returns. An instruction reflecting at least the substance of Head's proposal should have been given. *See United States v. Mitchell,* 495 F.2d 285 (4 Cir. 1974).

Finally, Head complains that the district judge erroneously rejected his proposed instructions defining business expenses for income tax purposes. While it may have been preferable for the court to present to the jury the more complete explanation of the law contained in Head's proposed instructions, it does appear that the instructions actually given were more favorable than those to which Head was entitled.

C. *Cross-Examination of Elko*

Head claims the district judge unduly restricted his cross-examination of Steven Elko. Throughout the trial defense counsel tried to show that Elko extorted contributions from Head. In that effort, counsel attempted to question Elko regarding his testimony before a congressional committee. In that testimony Elko had related a conversation in which Flood arguably instructed him to extort payments by using his "discretion" regarding government projects. Twice the district judge prohibited the inquiry, even though it addressed a crucial point of difference between Head's version of his dealings with Elko and Elko's story. While at the present time it is not necessary to label these rulings an abuse of discretion, we see no reason for restricting this area of inquiry upon retrial.

D. *IRS Code of Conduct*

Head claims that the Internal Revenue Manual on employee conduct was improperly admitted over his objection as to relevance. *United States v. Morlang,* 531 F.2d 183, 192 (4 Cir. 1975), upon which Head relies, found similar standards of conduct relevant in a case involving bribery of a federal official. To be admissible, the court held, such standards "must prescribe duties and modes of conduct as opposed to broad ethical and moral precepts." Here, the IRS standards specifically require agents "not to engage in any business or financial transaction with a taxpayer . . . under circumstances which

might reasonably be construed as influencing . . . performance of governmental duties." We think the standards are relevant to show that the type of action Head sought to influence was "governed by a lawful requirement of the executive department under whose authority [Hare] was acting," 531 F.2d at 192, and that the manual was properly admitted into evidence.

E. *Hearsay Testimony*

Head contends that the testimony of IRS agent Fox was based substantially on hearsay statements. The record supports this claim. Rule 703 of the Federal Rules of Evidence, however, permits an expert witness such as Fox to give opinion testimony even though based on hearsay statements not in evidence. This rule has been applied in tax prosecutions on facts very similar to this case. *See United States v. Genser*, 582 F.2d 292 (3 Cir. 1978), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979); *United States v. Williams*, 447 F.2d 1285 (5 Cir. 1971). The testimony is admissible where the expert opinion relies on the sort of material an expert might reasonably consider under the circumstances. *United States v. Genser, supra.* Here Fox relied primarily on his own conversations with Head's bookkeepers and with other IRS agents. Moreover, these individuals were themselves government witnesses available for cross-examination. It follows that the testimony of the IRS agent was admissible.

IV.

Sufficiency of the Evidence

Head argues finally that there is no evidence that any overt act in furtherance of the bribery objects occurred within the limitations period. Even if this argument accurately reflected the facts in the record,[9] however, it would not provide a ground

[9] Three such acts were alleged in the indictment and supported by proof at trial. Head asserts, and the government apparently concedes, that the two acts related to the Hare object were not shown to be in furtherance of the conspiracy. While Head advances the same argument with respect to the remaining act, related to the Flood-Elko bribery, the evidence supports a contrary inference when viewed in the light most favorable to the government.

for reversal. If Head had been convicted of three separate conspiracies, this argument might justify a directed verdict of acquittal on any count not supported by sufficient evidence. *See Yates v. United States*, 354 U.S. 298, 327-31, 77 S.Ct. 1064, 1081, 1 L.Ed.2d 1356 (1957). However, since we find sufficient evidence to support the government theory that Head was involved in a single conspiracy with multiple objects, it is unnecessary for us to find an act within the limitations period in furtherance of each object. At least three acts arguably in furtherance of the overall conspiracy, *i.e.* two tax filings and the payment of $1,000 to Elko, occurred within five years of the indictment. These provide evidence sufficient to overcome defendant's motion for a directed verdict of acquittal.

For these reasons, the judgment entered on the conviction is reversed and the case is remanded for a new trial consistent with this opinion.

Nos. 79-5293 and 79-5303:
REVERSED AND REMANDED.

No. 80-6727:
APPEAL DISMISSED.

Filed Feb. 10, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5123(L)

UNITED STATES OF AMERICA,
Appellee,

versus

MURDOCK HEAD,
Appellant.

No. 81-5184

UNITED STATES OF AMERICA,
Appellee,

versus

MURDOCK HEAD,
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Winter and Judge Ervin.

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX D
UNITED STATES CONSTITUTION

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * *

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* * * * * * *

26 U.S.C. § 7201

Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof

shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

* * * * * * * *

26 U.S.C. § 7206(2)

Fraud and false statements—Aid or Assistance

Any person who [w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .

* * * * * * * *

28 U.S.C. § 1291

Final decisions of the district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 79 115-A

UNITED STATES OF AMERICA

v.

MURDOCK HEAD

JULY 1979 TERM—AT ALEXANDRIA

COUNT VIII

THE GRAND JURY FURTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated by reference as though set forth in full.

B. That on or about May 20, 1974, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by Raven's Hollow, a Virginia corporation, to the United States of America for the fiscal year 1973, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Virginia, a false and fraudulent income tax return which was filed with the Internal Revenue Service

wherein it was alleged that the taxable income of the corporation for the said fiscal year was the sum of $38,449 and that the total amount of tax due thereon was the sum of $0.00, whereas, as he then and there well knew, the taxable income of the corporation for the said fiscal year was substantially greater and upon which taxable income the corporation owed to the United States of America a total tax substantially greater than that alleged.

(In violation of Section 7201, Internal Revenue Code, 26 U.S.C., Section 7201 and Title 18, United States Code, Section 2.)

* * * * * * *

COUNT IX

THE GRAND JURY FURTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated by reference as though set forth in full.

B. That on or about May 20, 1974, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service, of a corporate income tax return of Raven's Hollow, a Virginia corporation, for the fiscal year 1973, which was false and fraudulent as to material matters, in that it represented that the said Raven's Hollow was entitled, under the provisions of the Internal Revenue laws, to claim deductions in the total sum of $1,200,454.35, whereas, as the said defendant then and there well knew and believed, the total deductions which the said Raven's Hollow was entitled to claim for said fiscal year were substantially less than heretofore stated and were falsely and fraudulently characterized and identified in the corporate income tax return.

(In violation of Section 7206(2), Internal Revenue Code; 26 U.S.C. Section 7206(2).)

* * * * * * *

COUNT X

THE GRAND JURY FURTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated as though set forth in full.

B. That on or about May 2, 1975, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by Raven's Hollow, a Virginia corporation, to the United States of America for the fiscal year 1974, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Virginia, a false and fraudulent income tax return which was filed with the Internal Revenue Service wherein it was alleged that the taxable income of the corporation for the said fiscal year was the sum of minus (—) $41,606 and that the total amount of tax due thereon was the sum of $0.00, whereas, as he then and there well knew, the taxable income of the corporation for the said fiscal year was substantially greater and upon which taxable income the corporation owed to the United States of America a total tax substantially greater than that alleged.

(In violation of Section 7201, Internal Revenue Code, 26 U.S.C. Section 7201 and Title 18, United States Code, Section 2.)

* * * * * * *

COUNT XI

THE GRAND JURY FUTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated as though set forth in full.

B. That on or about May 2, 1975, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly aid and assist in, counsel, procure, and advise the preparation and presentation to

the Internal Revenue Service, of a corporate income tax return of Raven's Hollow, a Virginia corporation, for the fiscal year 1974, which was false and fraudulent as to material matters, in that it represented that the said Raven's Hollow was entitled, under the provisions of the Internal Revenue laws, to claim deductions in the total sum of $1,045,739.45, whereas, as the said defendant then and there well knew and believed, the total deductions which the said Raven's Hollow was entitled to claim for said fiscal year were substantially less than heretofore stated and were falsely and fraudulently characterized and identified in the corporate income tax return.

(In violation of Section 7206(2), Internal Revenue Code, 26 U.S.C. Section 7206(2).)

* * * * * * *

COUNT XII

THE GRAND JURY FURTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated as though set forth in full.

B. That on or about May 8, 1976, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by Raven's Hollow, a Virginia corporation, to the United States of America for the fiscal year 1975, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Eastern District of Virginia, a false and fraudulent income tax return which was filed with the Internal Revenue Service wherein it was alleged that the taxable income of the corporation for the said fiscal year was the sum of minus (–) $41,751 and that the total amount of tax due thereon

was the sum of $0.00, whereas, as he then and there well knew, the taxable income of the corporation for the said fiscal year was substantially greater and upon which taxable income the corporation owed to the United States of America a total tax substantially greater than that alleged.

(In violation of Section 7201, Internal Revenue Code, 26 U.S.C. Section 7201 and Title 18, United States Code, Section 2.)

* * * * * * *

COUNT XIII

THE GRAND JURY FURTHER CHARGES:

A. Paragraphs A1 and A5 of Count One are hereby realleged and incorporated as though set forth in full.

B. That on or about May 18, 1976, in the Eastern District of Virginia, the defendant MURDOCK HEAD, did wilfully and knowingly aid and assist in, counsel, procure, and advise the preparation and presentation to the Internal Revenue Service, of a corporate income tax return of Raven's Hollow, a Virginia corporation, for the fiscal year 1975, which was false and fraudulent as to material matters, in that it represented that the said Raven's Hollow was entitled, under the provisions of the Internal Revenue laws, to claim deductions in the total sum of $893,545, whereas, as the said defendant then and there well knew and believed, the total deductions which the said Raven's Hollow was entitled to claim for said fiscal year were substantially less than heretofore stated and were falsely and fraudulently characterized and identified in the corporate income tax return.

(In violation of Section 7206(2), Internal Revenue Code, 26 U.S.C. Section 7206(2).)

Filed Nov. 1, 1979

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 79-115-A

UNITED STATES OF AMERICA

v.

MURDOCK HEAD

ORDER

The Court, having considered defendant's motion and arguments thereon requesting a judgment of acquittal and dismissal of the defendant as to Count 8, and having heard and considered the government's arguments to the contrary, and being of the view that there exists, based upon the evidence addressed at trial, a reasonable doubt as to the guilt of the defendant on Count 8; it is hereby

ORDERED, ADJUDGED AND DECREED that the Clerk enter a judgment of acquittal as to Count 8 and Count 8 is hereby dismissed.

/s/ OREN R. LEWIS
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
Date:

Filed June 10, 1981

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5123

UNITED STATES OF AMERICA,
Appellee,

versus

MURDOCK HEAD,
Appellant.

ORDER

Upon consideration of the appellant's motion and memorandum of law to stay proceedings in the district court, the government's opposition to the motion, and the appellant's reply to the government's opposition, by counsel,

IT IS ORDERED that the motion to stay proceedings in the district court is DENIED.

Entered at the direction of Judge Winter, with the concurrences of Judge Field and Judge Phillips.

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

APPENDIX H

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO.

UNITED STATES OF AMERICA

v.

MURDOCK HEAD

JULY 1979 TERM—AT ALEXANDRIA

THE GRAND JURY CHARGES THAT:

COUNT I

* * *

OBJECTS OF THE CONSPIRACY

B. Beginning in or about September 1967 and continuing through in or about August 1977, the exact dates being to the Grand Jury unknown, in the Eastern District of Virginia, and elsewhere, the defendant MURDOCK HEAD did unlawfully, wilfully and knowingly combine, conspire, confederate and agree with the Airlie Foundation, Raven's Hollow, Daniel J. Flood, Stephen B. Elko, unindicted co-conspirators herein, and with divers other persons both known and unknown to the Grand Jury, to commit offenses against the United States of America, to wit:

1. Violations of Title 18, United States Code, Sections 201(b) and (f), Bribery of Public Officials;

2. Violations of Title 26, United States Code, Sections 7201, Tax Evasion and 7206(2), Aiding and Assisting in the Preparation of False Documents in connection with any matter arising under the Internal Revenue laws.

* * *

OVERT ACTS

D. In furtherance of the conspiracy and to effect the objects thereof, the defendant MURDOCK HEAD and the unindicted co-conspirators committed and caused to be committed, the following overt acts in the Eastern District of Virginia and elsewhere:

1. In or about August 1974, Stephen B. Elko received $1,000 in cash from MURDOCK HEAD at Airlie, Virginia which was delivered to Daniel J. Flood in the District of Columbia.

2. On or about May 2, 1975, MURDOCK HEAD caused to be prepared, signed and mailed from Airlie, Virginia to the Internal Revenue Service, Memphis Service Center, Memphis, Tennessee, a corporation income tax return in the name of Raven's Hollow for the fiscal year 1974.

3. On or about May 18, 1976, MURDOCK HEAD caused to be prepared, signed and mailed from Airlie, Virginia to the Internal Revenue Service, Memphis Service Center, Memphis, Tennessee, a corporation income tax return in the name of Raven's Hollow for the fiscal year 1975.

(In Violation of Title 18, United States Code, Section 371.)

Filed Feb. 16, 1983

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5123

UNITED STATES OF AMERICA,
Appellee,

versus

MURDOCK HEAD,
Appellant.

No. 81-5184

UNITED STATES OF AMERICA,
Appellee,

versus

MURDOCK HEAD,
Appellant.

ORDER

Upon consideration of a motion of the appellant, for stay of mandate pending application to the Supreme Court of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.

/s/ WILLIAM K. SLATE, II

CLERK

APPENDIX J

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C., 20543

February 22, 1983

Elliot L. Richardson, Esq.
1825 Eye Street, N.W., 9th Floor
Washington, DC 20006

RE: Murdock Head v. United States A-702

Dear Mr. Richardson:

Your application for a stay in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"Denied
WEB
2/19/83."

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By KATHERINE DOWNS
Assistant Clerk

gtb
cc: Honorable Rex E. Lee, Solicitor General
Elsie L. Munsell, Esq.

Office-Supreme Court, U.S.
FILED
JUN 1 1983
ALEXANDER L. STEVAS,

No. 82-1655

In the Supreme Court of the United States

OCTOBER TERM, 1982

MURDOCK HEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the government was collaterally estopped from proving at a retrial the tax object of a conspiracy charge because of earlier acquittals on substantive tax counts.

2. Whether petitioner was entitled to interlocutory review of this collateral estoppel claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1655

MURDOCK HEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 697 F.2d 1200.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1982. A petition for rehearing was denied on February 10, 1983 (Pet. App. 1c). The petition for a writ of certiorari was filed on April 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiring to bribe public officials and evade federal income taxes, in violation of 18 U.S.C. 371. He was acquitted by the jury on two substantive counts of aiding and abetting the evasion of taxes, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2, and acquitted by the court on a third such count after the jury hung. The court of appeals reversed his conviction on the ground that the jury had been improperly instructed (Pet. App. 1b-12b; 641 F.2d 174). On remand, petitioner unsuccessfully moved the district court to bar retrial, asserting double jeopardy objections. Both the district court and the court of appeals denied petitioner a stay of the trial pending interlocutory appeal of the district court's order (Pet. App. 1g). After a second jury trial, petitioner was again convicted on the conspiracy count and was also convicted on a substantive count of bribing a public official, in violation of 18 U.S.C. 201(f). He was sentenced to consecutive prison terms of three years and 18 months, respectively. In consolidated appeals, the court of appeals affirmed both of petitioner's convictions, as well as the district court's order denying his pretrial motion to bar the retrial (Pet. App. 1a-22a).

1. The evidence at trial showed that petitioner was founder and Executive Director of the Airlie Foundation, a tax-exempt educational association that produces documentary films. Airlie subcontracted all of its film making work to Raven's Hollow Limited, a federally taxable entity created by petitioner in 1963. Beginning in 1967, petitioner, together with others, devised a scheme to generate a "slush fund" by double

billing the travel expenses incurred by Raven's Hollow's film crews. The money derived from the slush fund, approximately $90,000 in all, was controlled by petitioner. The slush fund appeared in Raven's Hollow's books as reimbursement for actual travel expenses, and it was deducted as a business expense from Raven's Hollow's corporate income tax returns for 1973, 1974, and 1975 (9 J.A. 37-41; 10 J.A. 19-24, 70-77; 11 J.A. 4-12, 14-18, 60-62, 67).[1]

In 1970, petitioner began cultivating a relationship with Stephan Elko, an administrative assistant to Congressman Daniel Flood. Beginning in April 1971, petitioner paid to Elko a series of 11 bribes totaling $45,000 (9 J.A. 145-160, 175-178, 183-185, 195-200, 203-205). The money was divided among Elko, Flood, and Congressman Otto Passman. In return for the payments, the Congressmen and Elko agreed to use their influence with agencies and officials of the Executive Branch to obtain contracts and grants for the Airlie Foundation (see, *e.g.*, 9 J.A. 158, 165, 168, 171-173, 187, 197-198, 208-209). The money for the bribes derived from the slush fund (10 J.A. 16; 11 J.A. 9).

In September 1973, petitioner became aware that Raven's Hollow was going to have taxable income in fiscal 1973. At his direction, certain measures were implemented in order to permit Raven's Hollow to evade income taxes for 1973, including retroactively increasing rental payments on property leased from Airlie, writing in a new requirement that Raven's Hollow pay the taxes and insurance on the leased property, and deducting 1973 Christmas bonuses in 1973 although they were not paid until the 1974 tax year. The leases were backdated to appear as if they

[1] "J.A." refers to the Joint Appendix in the court of appeals.

were entered into at the beginning of fiscal year 1973, a maneuver that had tax consequences in fiscal years 1973, 1974, and 1975 (11 J.A. 40-46; 10 J.A. 279-286). Because a boat that petitioner owned was costing him a lot of money to maintain, petitioner told his friend Jack Forsythe that he could use it if he paid the storage and maintenance expenses. Thereafter, the boat was deducted from Raven's Hollow's 1973 tax return as a business expense on the basis that it constituted payment to Forsythe for legal and consultant fees. In fact, Forsythe never provided such services to Raven's Hollow (9 J.A. 318-322).

In 1974, at petitioner's direction, Raven's Hollow submitted fictitious bills to the Airlie Foundation for the rental of equipment. This money was then used to pay $25,600 to Herbert Frayer, a financial advisor to persons who made large contributions to the Airlie Foundation. Petitioner presented Frayer with two consultant fee statements and requested Frayer to sign them to make the transaction appear legitimate, even though Frayer had rendered no consulting services to Raven's Hollow. The $25,600 sum paid to Frayer was listed as a business expense on Raven's Hollow's 1974 tax return (10 J.A. 129-136, 145).

2. At the conclusion of the evidence at petitioner's first trial, the district court dismissed three counts charging him with procuring the filing of false income tax returns for the years 1973, 1974, and 1975, in violation of 26 U.S.C. 7206(2). The basis for this action was that the government had failed to prove that petitioner personally had prepared the Raven's Hollow tax returns at issue (1 J.A. 203-204), which the district court erroneously believed was an element of the offense (see Pet. App. 12a n.13). In addition, the jury acquitted petitioner on two counts of aiding

and abetting the evasion of income taxes by Raven's Hollow, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2, and the court acquitted him on a third such count on which the jury had hung. He was, however, as noted above, convicted of conspiracy under a count specifying tax evasion as one of the object offenses.

On remand to the district court following reversal of the conspiracy conviction, petitioner filed a motion contending that the dismissals and acquittals on the tax counts at the first trial collaterally estopped the government at his second trial from proving the tax objects of the conspiracy, particularly overt acts 19 and 20. Overt act 19 alleged that petitioner had "caused to be prepared, signed and mailed" to the Internal Revenue Service Raven's Hollow's tax return for 1974 (see Pet. App. 11a). Overt act 20 was virtually identical to overt act 19, except that it pertained to Raven's Hollow's tax return for 1975 (*ibid.*). The district court denied the motion, and petitioner took an immediate appeal, invoking *Abney* v. *United States*, 431 U.S. 651 (1977). Both the district court and the court of appeals (Pet. App. 1g) denied petitioner a stay pending appeal, and the case proceeded to retrial, at which petitioner was convicted.

3. The court of appeals consolidated petitioner's interlocutory appeal from the denial of his collateral estoppel claims with his appeal from the second judgment of conviction, and it affirmed on both appeals (Pet. App. 1a-22a). The court explained that its refusal to grant a stay had been intended as a summary disposition of petitioner's double jeopardy claims on the ground that "as double jeopardy claims, they were frivolous" (*id.* at 5a). The court held that petitioner was not entitled to interlocutory review of his claim

that proof of the tax object of the conspiracy should be barred at retrial on collateral estoppel grounds because, even if the claim were correct, trial and conviction on the conspiracy count would not be barred (*id.* at 7a-8a). The court reasoned that "double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible" (*id.* at 7a; footnote omitted).[2]

On the merits, the court rejected petitioner's collateral estoppel claim. The court held that the dismissal of the false filing counts on the ground that petitioner did not personally prepare the tax returns did not establish in petitioner's favor any fact relevant to the relitigation of overt acts 19 and 20 (Pet. App. 12a). The court further ruled that petitioner's acquittal on the tax evasion counts did not necessarily determine the allegations of overt acts 19 and 20 in his favor (*id.* at 13a). The court reasoned that the jury's verdicts (as well as the court's treatment of the count on which the jury had hung) could have been predicated solely on the amount of tax evaded, since the district court had instructed the jury that the amount evaded had to be "substantial" (*ibid.*).[3]

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[2] The court also explained that two other claims raised by petitioner on interlocutory appeal were not true double jeopardy claims appealable under *Abney* (Pet. App. 8a-10a).

[3] The amounts alleged to have been evaded on the two counts on which the jury acquitted petitioner were $9,294 and $6,249. The amount alleged on the count upon which the jury hung and the court acquitted petitioner was $43,695 (Pet. App. 12a n.14).

ARGUMENT

1. Petitioner contends (Pet. 8-22) that the dismissals and acquittals on the substantive tax counts at his first trial collaterally estopped the government from retrying him on the tax object of the conspiracy count. This contention was correctly rejected by the court of appeals. Moreover, the decision below turns completely on its unusual facts and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review is unwarranted.

At the outset we note that, whether or not the jury found the conspiracy to have embraced the tax object, it is evident that the jury in fact found petitioner guilty of conspiracy to commit bribery. This is apparent from the fact that petitioner was also convicted on the substantive bribery charge, which corresponded to overt act 14 of the conspiracy count.[4] Accordingly, even if petitioner's collateral estoppel argument were correct, it would not entitle him to reversal of his conspiracy conviction. See, *e.g.*, *United States* v. *Erickson*, 601 F.2d 296, 303 (7th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976).[5]

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[4] Stephen Elko, through whom the bribe was paid, and Congressman Flood, its recipient, were named in the indictment as co-conspirators.

[5] *United States* v. *Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), appears to diverge from this line of authority. It is distinguishable from this case, however, in that the court found that there was a slim possibility that the jury had found a conspiracy that did not encompass commission of the substantive offense of which he was convicted. Moreover, the precedential force of other than a very narrow reading of *Dansker* even in the Third Circuit has been

In any event, the court of appeals correctly rejected petitioner's collateral estoppel claim. It is well settled that the doctrine of collateral estoppel is applicable only when the defendant can show that the jury's verdict in the prior trial necessarily decided in his favor the issue he seeks to foreclose from further litigation. See, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970); *United States* v. *Lee*, 622 F.2d 787, 790 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981); *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977).[6] Here,

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thrown into doubt by later decisions. See *United States* v. *Riccobene*, Nos. 82-1399, *et al.* (3d Cir., May 20, 1983), slip op. 25-31; *United States* v. *Schoenhut*, 576 F.2d 1010, 1026-1028 (3d Cir.), cert. denied, 439 U.S. 964 (1978).

[6] Petitioner's contention (Pet. 9-14) that there is confusion in the lower courts concerning this standard is wholly without foundation. He argues (*id.* at 13 & n.7) that dicta in two courts of appeals decisions stand for a rule that collateral estoppel must apply "when the first acquittal appeared reasonably likely to have been grounded on an issue in the second trial," thus establishing a conflict in the circuits, but this argument is specious. These decisions plainly do not stand for such a sweeping and novel proposition. They simply recognize that the collateral estoppel determination cannot be based simply on some fanciful theory as to what the first jury *could* have done, but must reflect the reality of what was actually contested at trial. For example, in *Johnson* v. *Estelle*, 506 F.2d 347, 352 (5th Cir.), cert. denied, 422 U.S. 1024 (1975), the court rejected the prosecution's suggestion that the acquittal there theoretically could have been based on some technical factors that would not collaterally estop a second conviction, noting that there was "no evidence suggesting that those factors were even presented to the first jury." Neither *Johnson* nor *Phillips* v. *United States*, 502 F.2d 227 (4th Cir. 1974), suggests any departure from the conventional collateral estoppel standard. Indeed, subsequent cases in both circuits have confirmed that the inquiry is whether

petitioner erroneously argues that the dismissals and acquittals at his first trial necessarily constituted determinations that he did not entertain the intent necessary to support a conspiracy conviction with respect to the tax object.

Contrary to petitioner's contention (Pet. 16-17), the district court's dismissal of the three false filing counts at petitioner's first trial plainly had no collateral estoppel effect on the proof that could be adduced at the second trial. The court of appeals found that the dismissals were predicated on the court's erroneous assumption that the government was required to prove that petitioner had actually prepared the Raven's Hollow tax returns at issue (Pet. App. 12a).[7] The record clearly supports that finding. In dismissing the false filing counts the district court stated (1 J.A. 203-204) that 26 U.S.C. 7206(2) is:

> a sub-section applicable to the preparer of the return. There is no evidence in this case that I heard of that [petitioner] prepared this return. This one sub-section is applicable to the preparer of the tax return to distinguish from the other one and makes him equally liable with the pre-

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the factual issue in question was necessarily determined by the first jury in the defendant's favor. See *United States* v. *Lee*, *supra*; Pet. App. 12a.

[7] As the court of appeals noted (Pet. App. 12a n.13), and as the statutory language makes plain (see Pet. App. 2d), 26 U.S.C. 7206(2) applies to any person who "procures, counsels, or advises the preparation * * * of a [false] return." Accordingly, the prohibition reaches individuals who are involved in the concealment of a taxable business interest even if they do not actually prepare the tax return. See, *e.g.*, *United States* v. *Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978); *United States* v. *Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976).

> parer such as a C.P.A. or private attorney or private accountant. That is what that statute applies to.

This finding that petitioner had not personally prepared the Raven's Hollow tax returns could not conceivably bar his retrial on the tax object of the conspiracy, because to establish the conspiracy the government had to show only that petitioner agreed with and caused others to attempt to evade taxes on behalf of Raven's Hollow. The district court itself recognized this distinction in permitting the false filing prong of the tax object of the conspiracy charge to go to the jury at the first trial despite the dismissal of the false filing counts.

Nor did the acquittals of petitioner at his first trial on the tax evasion counts collaterally estop proof of the tax object of the conspiracy at his retrial.[8] Contrary to petitioner's contention (Pet. 15-19), these acquittals did not necessarily represent a factual determination that he lacked the requisite intent to achieve the tax object of the conspiracy. In accordance with prevailing law (see, *e.g.*, *United States* v. *Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969)), the district court instructed the jury at the first trial that in order for it to find petitioner guilty of tax evasion the amount evaded had to be "substantial." The substantiality of the amount of tax evaded was a contested issue in the case; defense counsel argued in summation that there was "no substantial sum due and owing"

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[8] The district court itself indicated at the hearing on the collateral estoppel claim that its acquittal on the 1973 tax evasion count did not determine any issue that would foreclose retrial on the tax object of the conspiracy. May 15, 1981 Tr. 33.

(Tr. 1805-1806). As the court below concluded, therefore, the acquittals "obviously could have been predicated solely on the amount of tax evaded" (Pet. App. 13a; footnote omitted). Indeed, this was more than a possibility; the record suggests that the most plausible explanation of the jury acquittals is that they were based on the jury's view that petitioner had not evaded a *substantial* amount of taxes. The jury was hung on the 1973 count involving an evasion of $43,695 in taxes, whereas the two counts on which the jury acquitted petitioner involved $9,294 and $6,249. Apart from the amounts, the evidence with respect to the three tax evasion counts was similar (see Pet. App. 12a n.14). Thus, it is clear that the acquittals on the substantive tax evasion counts did not necessarily represent a factual finding that "any failure to pay taxes due and owing to the United States by Raven's Hollow caused by petitioner was not willful" (see Pet. 18), and hence the acquittals did not collaterally estop the prosecution from proving at the retrial petitioner's willfulness to achieve the tax object of the conspiracy.

Petitioner also suggests (Pet. 21) that, even accepting the court of appeals' analysis, proof of the tax object of the conspiracy was barred because of the determination implicit in the acquittals that there was not a substantial amount of tax evaded. This suggestion fails for several reasons. First, it is well settled that successful commission of the substantive offense is not an element of the crime of conspiracy. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *United States* v. *Ballard*, 586 F.2d 1060, 1064 (5th Cir. 1978). Petitioner could have conspired to evade a substantial amount of taxes, and been convicted of that offense, even if it ultimately turned out that the amount of taxes actually evaded

was insubstantial or zero. Moreover, even assuming that petitioner did not conspire to evade any more taxes than actually were evaded, the acquittals on the substantive counts still did not preclude a finding that petitioner conspired to evade taxes. The jury at the retrial, in considering a single conspiracy charge rather than three separate counts, was entitled to aggregate the amounts evaded in each year in considering whether the tax evasion was substantial. Therefore, even if the acquittals conclusively determined that the amount of tax evaded in each year was not substantial, the jury on retrial on the conspiracy count was free to conclude that the total tax evaded over the period of the conspiracy was substantial.

More fundamentally, it is simply not so (cf. Pet. 21) that conviction on the conspiracy charge required a finding that petitioner attempted to evade a substantial amount of tax. The tax object of the conspiracy encompasesd a conspiracy to file false returns, in violation of 26 U.S.C. 7206(2), which has no substantiality requirement. As noted above, the court's dismissal of the false filing counts at the first trial had no collateral estoppel effect relevant to the retrial because it was based on the court's conclusion that the government had failed to prove that petitioner himself prepared the tax returns, which in fact was not an element of the offense.[9] Thus, the govern-

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[9] Petitioner's contention (Pet. 17 n.9) that this analysis is inconsistent with *United States* v. *Scott*, 437 U.S. 82, 97 (1978), is quite mystifying. Whether or not the court's dismissals should have been characterized as acquittals and thus immune from further review as *res judicata*, it is clear that the *collateral estoppel* effect of the dismissals cannot extend beyond the factual resolutions made by the court, which per-

ment was free to prove at the retrial that petitioner conspired to file false returns, regardless of whether he actually prepared the returns or whether the amount of tax evaded thereby was substantial, and the court of appeals correctly rejected petitioner's collateral estoppel claim.

Finally, underlying petitioner's submission is the basic idea that the collateral estoppel standard applied by the court of appeals is somehow "intolerable" because it makes it difficult for defendants who present several defenses to take advantage of the collateral estoppel doctrine. See Pet. 12-13. This contention misperceives the purposes of the Double Jeopardy Clause. The provision is aimed at preventing government oppression, not at maximizing the benefits received by a defendant from a favorable disposition by the factfinder. When an individual has been acquitted on a charge, it is unfair to retry him on another charge requiring proof of the same facts necessarily resolved in the individual's favor by the first jury. See *Ashe* v. *Swenson*, *supra*. On the other hand, it is not unfair to retry petitioner on a charge on which his previous conviction has been reversed, simply because he was also acquitted on a related charge, as long as the acquittal did not resolve the factual issue to be litigated at the retrial.

It is ironic, to say the least, that petitioner should claim that the prevailing collateral estoppel standard makes it unduly difficult for him to reap the benefit of the double jeopardy protection, for petitioner has enjoyed considerable windfall benefit from the Double Jeopardy Clause. Through the combination of the

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tained to facts not in issue at the retrial (or, indeed, at the first trial), *i.e.*, petitioner's participation in actually preparing the returns.

trial judge's actions and the protections of the Double Jeopardy Clause, several strong substantive charges against petitioner never reached the jury. At petitioner's first trial, the court dismissed several substantive bribery counts against him, and it acquitted petitioner on a substantive tax evasion count on which there was plainly sufficient evidence to support a conviction. In addition, the court dismissed the three false filing counts because it required proof of an additional element not required by the statute. Because of double jeopardy problems, none of these rulings was appealed, and none of these counts was ever submitted to the jury. Against this background, it ill behooves petitioner to claim that his double jeopardy rights are being trampled because these erroneous and unjustified dispositions in his favor are not held also to collaterally estop the proof of the tax object of the conspiracy of which he was twice convicted by a jury. Cf. *Standefer* v. *United States*, 447 U.S. 10, 25 (1980).

2. Petitioner contends (Pet. 22-29) that the court below erred in permitting his retrial to go forward after he had filed an interlocutory appeal from the district court's order rejecting his collateral estoppel claim. At the outset, we note that, even assuming that the court of appeals' denial of a stay of trial was erroneous, it would be senseless to grant petitioner a third trial on the conspiracy charge when the court of appeals ultimately accorded petitioner's collateral estoppel claim full-scale review and correctly determined it to be without merit. Such a result would stand double jeopardy policies on their head because no double jeopardy interest of petitioner was violated by the failure to consider his collateral estoppel claims fully at an interlocutory stage. In any event, petitioner's contention is without merit.

Petitioner apparently concedes (Pet. 26) that a defendant is not entitled to interlocutory review of a double jeopardy claim under *Abney* v. *United States*, 431 U.S. 651 (1977), where the claim is determined to be frivolous. See *id.* at 662 n.8; *United States* v. *Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980). Instead, petitioner makes three arguments directed at the court of appeals' conclusion that interlocutory appeal did not lie in this case.

The court of appeals held (Pet. App. 6a-8a) that petitioner's collateral estoppel claim was not a true "double jeopardy" claim subject to interlocutory appeal under *Abney* because, even if upheld, it would only have limited the proof at retrial, but would not have barred retrial and conviction on the conspiracy count.[10] Relying on *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980), and *United States* v. *DeVincent*, 632 F.2d 155, 160-161 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981), petitioner argues (Pet. 23-25) that there is a conflict among the circuits on this issue. It is true that in *Larkin* and *DeVincent* the courts accorded interlocutory review to collateral estoppel claims that would not have completely precluded con-

[10] In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court held that principles of collateral estoppel are embodied in the Double Jeopardy Clause. But that holding was made in a context where facts necessarily determined in the defendant's favor by his earlier acquittal completely barred his conviction at a second trial. Here, by contrast, even if proof of the tax object of the conspiracy count were completely barred, as petitioner claimed, petitioner would still have been subject to conviction for the conspiracy based on the bribery object.

viction at a retrial. In neither case does it appear that the government questioned the applicability of *Abney*, however, and the courts merely assumed without discusison that interlocutory appeal was available. Thus, there is not a genuine conflict in the courts of appeals on this issue. Indeed, in a case decided less than a month before *Larkin*, another panel of the Fifth Circiut expressly addressed this issue and concluded that collateral estoppel claims that do not completely bar conviction are not subject to interlocutory appeal. *United States* v. *Mock*, 604 F.2d 336, 338-340 (5th Cir. 1979). Accord, *United States* v. *Powell*, 632 F.2d 754, 758 (9th Cir. 1980). This view fully accords with the policies of *Abney*, and hence the court of appeals' decision is correct.

Second, relying on *United States* v. *Dunbar*, *supra*, petitioner appears to argue (Pet. 25-27) that the district court lacked jurisdiction to try him until the court of appeals rendered an opinion on the merits of his interlocutory appeal. This argument is specious. In *Dunbar*, the court held that, upon a written finding that the defendant's *Abney* appeal is frivolous, a district court may retain jurisdiction of the case; it further stated that the court of appeals, if requested, should review the finding of frivolousness as expeditiously as possible. 611 F.2d at 988-989. See also *United States* v. *Leppo*, *supra*, 634 F.2d at 105; *United States* v. *Hines*, 689 F.2d 934, 937 (10th Cir. 1982). However, the expedited review called for by the court in *Dunbar* applies only to the finding of frivolousness, not to the merits of the claim asserted. Here, the court of appeals' denial of petitioner's motion for a stay of the trial pending interlocutory appeal (see Pet. App. 4a-5a) constituted an implicit finding that the appeal was frivolous; indeed, the

court subsequently stated in its opinion below that its intent in denying the stay was to "dispose summarily of [petitioner's] claims on the basis that, as double jeopardy claims, they were frivolous" (*ibid.*). Accordingly, petitioner received the expedited review required by *Dunbar*.[11] Whether petitioner's cl[illegible] are on further reflection deemed to be merely erroneous rather than frivolous does not offset the jurisdiction to proceed with trial.

Finally, petitioner argues (Pet. 28-29) that the court below applied an incorrect standard of frivolousness. He suggests that the appropriate standard is the one employed in evaluating the right to appeal *in forma pauperis*—whether the claim is "without arguable merit" (*Watson* v. *Ault*, 525 F.2d 886, 892 (5th Cir. 1976)), or without merit "beyond doubt" (*Boyce* v. *Alizaduh*, 595 F.2d 948, 951-952 & n.8 (4th Cir. 1970)). The court here held that where a defendant's claim is "manifestly 'double jeopardy' in substantive content" the test is whether it is "wholly lacking in merit" (Pet. App. 6a)—a standard essentially identical to the ones set forth above. That standard was inapplicable here because the court determined that petitioner's claim was "manifestly not [double jeopardy] in substantive content." *Ibid.* In other words, the court concluded that petitioner's claim "manifestly" was not one to which he was entitled to an interlocutory appeal under *Abney*. Accordingly, just as with any evidentiary issue, whether

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[11] The failure of the district court to make a written finding of frivolousness (cf. Pet. 27) was insignificant in view of the fact that petitioner obtained appellate review of the court's oral finding (see May 15, 1981 Tr. 35-36); under *Dunbar*, the purpose of requiring a written finding is to facilitate such review. 611 F.2d at 989.

or not the merits of the appeal were frivolous, petitioner was bound to wait until after trial for an appellate hearing on his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MURDOCK HEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner submits this reply brief to correct certain misapprehensions created by the government's brief in opposition to the petition for certiorari. Petitioner notes at the outset, however, that throughout its brief the government offers as facts numerous disputed allegations concerning petitioner that the jury never necessarily accepted—allegations that serve no purpose other than to prejudice petitioner in the eyes of this Court and to demonstrate the infirmity of the government's substantive arguments. These allegations, and their prejudicial effects, would have been precluded from presentation to the jury if petitioner's double jeopardy claims had been upheld. The goal of orderly judicial testing of criminal allegations is reduced to a nullity if the government may now litter the record with such unsubstantiated assertions.

I. PETITIONER IS ENTITLED TO THE COLLATERAL ESTOPPEL BAR THAT HE ASSERTS, AND THIS COURT SHOULD REVIEW THIS CASE TO ENSURE THAT THE LOWER COURTS DO NOT EVISCERATE THE PROTECTION INTENDED BY THE DOUBLE JEOPARDY CLAUSE.

The government does not deny that the court below failed to undertake the type of review that collateral estoppel claims require under *Ashe v. Swenson*, 397 U.S. 436 (1970), which mandates that lower courts " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matters, [to] conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444 (citation omitted). Apparently, the government itself failed to conduct such a review before deciding to oppose the petition for certiorari in this case and has simply endorsed the speculative theories postulated by the court below for the fact finders' acquittals at the first trial.

Instead, the government urges this Court to acquiesce in the very error that the court below fell into: casting about for any conceivable theory, no matter how unreasonable, that might sustain a conviction and avoid the just application of collateral estoppel. This practice, common among the lower courts, fails to heed *Ashe's* mandate that collateral estoppel be applied with realism, rationality, and practicality.

A. Although Petitioner's Collateral Estoppel Claim Goes to Only One Object of a Multiple-Object Conspiracy, He Is Nonetheless Entitled to a Reversal of His Conspiracy Conviction.

The government states (Resp. 7)* that even if petitioner's collateral estoppel claim involving the tax object of the conspiracy is valid, it does not entitle him to reversal of his conviction, because it is "evident" that the jury found petitioner guilty of the bribery object of the conspiracy. The government cites several inapposite cases that stand for the debatable

* The term "Resp." is used in reference to the brief of the United States in opposition to the petition for certiorari.

proposition that multiple-object conspiracy convictions may be upheld, even though one or more of the alleged objects may have been improperly defined, when the jury has convicted the defendant of a substantive offense validly charged as an object of the conspiracy. *See, e.g., United States v. Dixon,* 536 F.2d 1388, 1402 (2d Cir. 1976).

This proposition is fatally undermined by the fact that "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States,* 328 U.S. 640, 643 (1946), *reh'g denied,* 328 U.S. 818 (1946). As a result, "it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged." *United States v. Dansker,* 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). The Fourth Circuit recognized this principle during petitioner's appeal after his first trial, noting that "a verdict of guilty on a substantive offense does not necessarily show that the jury found a conspiracy to commit that same offense where other offenses are also alleged as objects of the conspiracy." *United States v. Head,* 641 F.2d 174, 179 n.7 (4th Cir. 1981) (Pet. App. 6b).

The government ignores the rule established by this Court for reviewing convictions for which both a valid and an infirm basis exist. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States,* 354 U.S. 298, 312 (1957); *see also Stromberg v. California,* 283 U.S. 359 (1931); *United States v. Head,* 641 F.2d at 179 (Pet. App. 7b). Thus, the possibility that petitioner's conspiracy conviction by the jury in the second trial was based upon a collaterally estopped issue in violation of the Double Jeopardy Clause mandates reversal of that conviction.

B. The Standard Laid Down in *Ashe* for the Application of Collateral Estoppel Is Subject to Divergent Interpretations Among the Lower Courts.

The government's assertion (Resp. 8) that the varying standards that lower courts apply in practice in construing *Ashe* are of no moment only evidences the government's willing participation in the evisceration of the collateral estoppel component of the Double Jeopardy Clause. The strict interpretation of *Ashe* by the lower courts has resulted in a situation in which "[t]he defense of collateral estoppel will not often be available to a criminal defendant." Shaefer, *Unresolved Issues in the Law of Double Jeopardy, Waller and Ashe*, 58 Calif. L. Rev. 391, 394 (1970); *see also Martin v. Estelle*, 691 F.2d 202, 205, *reh'g denied*, 693 F.2d 133 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1277 (1983). *Ashe* has unquestionably caused confusion in what lower courts do, regardless of how clearly or vaguely they have articulated these differences. *See* Note, *Double Jeopardy: Multiple Prosecutions Arising from the Same Transaction*, 15 Am. Crim. L. Rev. 259 (1978). The government itself cites a Second Circuit case, *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976), *cert. denied*, 429 U.S. 1043 (1977), criticized by the Ninth Circuit on the ground that its "extremely restrictive" application of collateral estoppel "cannot be squared with the teachings of the United States Supreme Court in *Ashe v. Swenson.*" *United States v. Hernandez*, 572 F.2d 218, 222 n.5 (9th Cir. 1978).

C. The District Court's Dismissal of the False Filing Counts Collaterally Estopped Introduction of the False Filing Prong of the Tax Object of the Conspiracy at Retrial.

The government claims that the only fact necessarily determined by the district court's dismissal of the three false filing counts at the first trial was that petitioner had not personally prepared the tax returns. (Resp. 9-10.) In fact, had the government examined the record more carefully, as *Ashe* requires a reviewing court to do, it would have discovered that, prior to dismissing the false filing charges, the trial judge was presented a copy of *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976) (A.I. 321-23), which endorses the government's theory on the reach of 26 U.S.C. § 7206(2)(1976). There is no

evidence that the judge acted on the basis of any disagreement with *Crum*. Rather, prior to dismissing the false filing charges, the trial judge emphasized that there was no evidence that petitioner either "had knowledge of what was in [the returns]," (A.I. 204), or "had any direct contact of any kind . . . [with] the preparation of the tax return[s]; no evidence he saw [them]; no evidence he was asked to approve [them] or had anything to do with [them]." (A.I. 203.) Therefore, the facts reasonably determined by the judge's dismissal of the false filing charges are that petitioner did not procure, counsel, or advise the preparation of any false returns.

The only overt acts in furtherance of the false filing prong of the tax object that the government alleged were that petitioner "caused to be prepared" two of the three returns subject to the substantive acquittals. These overt acts are within the scope of what the judge determined not to have occurred when he dismissed the false filing charges, since petitioner could not have caused to be prepared any returns, the preparation of which he did not procure, counsel or advise. The government cannot be allowed "a second bite at the apple" by once again introducing the previously determined and identical "insufficient evidence" to prove causation of false filing under the guise of overt acts in furtherance of a single object of a multiple-object conspiracy.

D. The Acquittals on the Tax Evasion Counts Collaterally Estopped Introduction of the Tax Evasion Prong of the Tax Object of the Conspiracy at Retrial.

In its analysis of the acquittals of the tax evasion charges, the government once again ignores petitioner's principal argument and offers only a hypertechnical and unrealistic theory unsupported by the lower court record. In petitioner's first trial, the district court entered an acquittal on the 1973 count of tax evasion, which involved a far greater amount of taxes than the 1974 and 1975 counts. In doing so, the court rejected the prosecutor's argument that the acquittals on tax evasion charges for 1974 and 1975 could have been based on the insubstantiality of the taxes involved, reasoning instead that the jury

had found that the failure to pay taxes in 1974 and 1975 was not "willful." (A.I. 241.) This finding alone should have precluded the retrial of the entire tax object of the conspiracy, because the absence of willfulness would negate the requisite intent for all substantive tax offenses, and the requisite intent to commit a substantive offense must exist before a defendant can be convicted of a conspiracy to commit the same offense. *See Ingram v. United States*, 360 U.S. 672, 678 (1959), *reh'g denied*, 361 U.S. 856 (1959).

The court below nevertheless speculated that the acquittals of the 1974 and 1975 tax evasion counts could have been based on a jury conclusion that the amounts of tax allegedly evaded were insubstantial. The government blindly endorses this view in its brief, but the argument fails in three independent respects. First, the government notes (Resp. 11-12) without any support that petitioner could be convicted of conspiracy to evade a substantial amount of taxes, even in the absence of a substantial amount of taxes due and owing. But unless a conspiracy would, if successfully carried out, result in the violation of a legal duty, there can be no criminal liability.

> Whatever the taxpayer's criminal state of mind may have been at the time that he filed his tax return or should have filed it and whatever wrongful conduct he may have engaged in is of no import if, in fact, a tax is not shown to be due and owing.

B. Kostelanetz & L. Bender, *Criminal Aspects of Tax Fraud Cases* 7 (3d ed. 1980). Second, and in any event, the government never argued during the lower court proceedings, and no evidence was introduced tending to show, that petitioner conspired to evade a greater amount of taxes than it had charged him with evading. This type of wildly theoretical supposition, totally unsupported by the record, is exactly what *Ashe* sought to prevent. Finally, contrary to common sense, the government simply assumes that a jury would find amounts of $9,294 and $6,249 insubstantial. *But see, e.g., United States v. Marks*, 282 F. Supp. 546 (D. Or. 1966), *aff'd*, 391 F.2d 210 (9th Cir. 1968) ($375 tax deficiency viewed as substantial because tax return reflected nothing due), *cert. denied*, 393 U.S. 839 (1968).

The government lastly asserts (Resp. 12) that even if the insubstantiality of the amount of taxes involved in 1974 and 1975 does negate the requisite intent for the tax evasion charges, the jury at the retrial of the single conspiracy count was entitled to aggregate the amounts allegedly evaded each year in considering whether the amounts evaded were substantial. This argument is spurious. Aside from the fact that the jury was never instructed that it could aggregate the amounts, the government disregards the fact that the amounts alleged to have been evaded by Raven's Hollow were never established. One of petitioner's principal defenses throughout the course of the proceedings was that no taxes were due and owing during the years in question. In this context, it must be assumed that a finding of insubstantiality is equivalent to a finding that no taxes were due and owing and that, if aggregated, those taxes would still have been insubstantial. This leads to the conslusion that petitioner lacked the intent to commit substantive tax violations in each of the tax years, or in all of them combined. Once again, an *Ashe*-type review of the record, with an eye toward realism and practicality, would prevent the kind of baseless speculation that the government urges.

E. The Absence of Intent to Defraud by Means of Tax Evasion Negates the Existence of the Intent Necessary to Defraud by Means of False Filing in Regard to the Same Tax Years.

The government implicitly argues (Resp. 12-13) that even if this Court concludes that petitioner lacked the intent to commit tax evasion because of the insubstantiality of the taxes at stake, petitioner may nonetheless possess the intent to commit the crime of false filing and, consequently, the intent to conspire to defraud the United States through false filing. While the evasion of a substantial amount of tax is not an express requirement of a false filing violation, the absence of substantiality (*e.g.*, by omitting deductions that would decrease net income) would, in any event, demonstrate an absence of intent willfully to defraud by such means, for such intent must relate to a desire to save taxes. Two leading commentators on criminal tax fraud have adopted this view. *See* B. Kostelanetz & L. Bender, *Criminal Aspects of Tax Fraud Cases* 26 (3d ed. 1980).

F. The Constitution Does Not Limit the Quantum of Double Jeopardy Protection to Which Petitioner Is Entitled.

The government makes the astonishing contention (Resp. 13-14) that, because petitioner has already enjoyed some benefit from the Double Jeopardy Clause, he is entitled to no more. Petitioner is unaware of any provision of the Constitution that rations the individual rights of United States citizens. The issue is not what quantum of constitutional protection petitioner has enjoyed, but whether petitioner has been forced to relitigate facts previously determined in his favor in circumstances where the Constitution says he should not be required to do so.

II. REVERSAL IS NECESSARY TO VINDICATE THE POLICIES OF *ABNEY v. UNITED STATES.*

The government contends that even if the court of appeals' denial of a stay of trial was at odds with *Abney v. United States,* 431 U.S. 651 (1977), this Court should not afford any remedy to petitioner. The government's argument conveniently ignores the fact that, by simply failing to issue an order granting or denying petitioner's appeal, the court of appeals effectively prevented petitioner from seeking this Court's review on the issue of whether an interlocutory appeal was appropriate. In these circumstances, the only effective method of policing the lower courts' observance of *Abney* is to reverse convictions obtained while proper interlocutory appeals were pending.

Unless this approach is followed, defendants such as petitioner will be effectively deprived of their double jeopardy rights because, even if they are ultimately acquitted at their second trials, they will be forced to relitigate issues determined in their favor in previous trials. That is, they will be forced to " 'run the gantlet' a second time." *Ashe v. Swenson,* 397 U.S. at 446 (citation omitted). While this harm cannot entirely be undone once it occurs, the likelihood of its future occurrence can be minimized by means of reversals in appropriate cases such as this.

This Court's intervention is particularly necessary where, as here, the government apparently concedes that its own attorneys have acquiesced in inconsistent interpretations of *Abney* (Resp. at 16, noting that the government has not questioned the applicability of *Abney* to collateral estoppel claims that would not have completely precluded conviction at a retrial in some cases). The genuine confusion of the lower courts on the circumstances in which rights to an *Abney* appeal arise is only underscored by the government's own citation of cases within the same circuit that follow inconsistent approaches. *Compare United States v. Larkin,* 605 F.2d 1360 (5th Cir. 1979), *modified on other grounds,* 611 F.2d 585 (5th Cir.), *cert. denied,* 446 U.S. 939 (1980), with *United States v. Mock,* 604 F.2d 336 (5th Cir. 1979).

The government also argues (Resp. at 17) that the standard of "frivolousness" applied by the court below is "essentially identical" to the standard applied in cases evaluating the right to appeal *in forma pauperis.* In fact, any similarity is purely semantic. In the *in forma pauperis* cases that petitioner has adduced, the courts have examined the merits of a claim to determine whether it is unsupported by rational argument on the law or facts. While the court below held that when a defendant's claim is "manifestly 'double jeopardy' in substantive content," the test of frivolousness is whether it is "wholly lacking in merit." *United States v. Head,* 697 F.2d 1200, 1204-05 (4th Cir. 1982), *reh'g denied,* Feb. 10, 1983. (Pet. App. 6a.) It also rejected as frivolous *per se* all claims "manifestly not [double jeopardy] in substantive content." *Id.* But, egregiously, the court also held that all double jeopardy-collateral estoppel claims that would limit proof of a particular basis of conviction, but that would not necessarily bar conviction on *all* bases, are *ipso facto* "manifestly not [double jeopardy] in substantive content." *Id.* The court placed petitioner's claims in this latter category. Thus, the court below never determined that petitioner's claims were without arguable merit, but rather subjected them to a rigid system of classification based upon an error of law. Clearly, then, the court below indeed applied an erroneous test of frivolousness.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court below should be summarily reversed.

Respectfully submitted,

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